THE LEGAL STATUS OF LOTTERY SCHEMES IN CANADA:
CHANGING THE RULES OF THE GAME

By

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ABSTRACT

The term "lottery scheme" is a generic one used in the Criminal Code of Canada to encompass both true lotteries and other games of chance. Until 1969, the Criminal Code prohibited such gambling activities, with the exception of very small scale, occasional and private lottery schemes run for charitable purposes, and lottery schemes operated at agricultural fairs. This criminal prohibition was a longstanding one which had existed in Canada since before Confederation. Twenty years ago, however, the Criminal Code was amended to permit state-operated and state-licensed lottery schemes.

As a consequence of this relaxation of the criminal law, legalized gambling has, since the early 1970s, flourished and become firmly established in Canadian society. In part, this reflects a general international trend; similar developments have taken place in the United States, Australia and Europe. In Canada, however, this development occurred in the absence of widespread public debate, political rationalization or academic analysis. There is not much known about how or why it came about, its legal validity, or what its implications are.

This thesis addresses these neglected issues, provides some understanding of how the legal status of lottery schemes was transformed in 1969, why it occurred and what its consequences have been. These aims are achieved through
an examination of five distinct but related research dimensions: legal history, political process, legal theory, constitutional law and administrative law.

This study finds that what was a fairly radical change in the rules regarding lottery schemes was achieved relatively quickly, with a minimum of fuss and very little in the way of public discussion. It was a silent transformation. This lack of debate is at least partly responsible for the incoherent response on the part of some provinces, which soon took advantage of their ability to conduct and manage lottery schemes, but did not appear to have an articulate gaming control policy.

It is shown that while there were well-established, philosophically sound reasons for the removal of criminal sanctions from certain gambling games, there were also political, social and economic reasons which were equally if not more important in explaining its occurrence. These justifications even overrode the legal constraints of Canada's constitutional framework: the decriminalization of lottery schemes was achieved through a dubious interdelegation of powers between the federal and provincial legislatures. Not only is this arrangement constitutionally unsound, but it also ignored the interests of an important segment of Canada's population: its aboriginal peoples. The right to conduct and control gaming on Indian lands is the focus of a tri-partite jurisdictional struggle which will
likely soon force a re-examination of the legal status of lottery schemes in Canada.
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TO COLIN
INTRODUCTION

This year marks the twentieth anniversary of the partial decriminalization(1) of lottery schemes in Canada. The term "lottery scheme" is a generic one, used in the Criminal Code of Canada(2) to encompass true lotteries and other games of chance which, in this thesis, will also be known as quasi-lotteries. Section 207(4) of the Criminal Code, in conjunction with s. 206(1), defines "lottery scheme" as "a game or any proposal, scheme, plan, device, contrivance or operation" which involves either disposing of any property by lots, cards, tickets, "or any mode of chance whatever"; disposing of any goods by a game of chance or a game of mixed chance and skill in which the contestant pays money or other valuable consideration; or inducing anyone to stake money or other valuable consideration "on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune". It is, therefore, despite its name, a legal construct which encompasses much more than the true lottery scheme.

1 In this thesis, "decriminalization" will refer to the repeal of laws that make certain forms of gambling illegal. The term "legalization" will refer to state-operated or state-sanctioned gambling activities. This terminology is adapted from the usage in the report of the Twentieth Century Fund, Easy Money: Report of the Task Force on Legalized Gambling (New York: T.C.F., 1974).

Before the enactment of the *Criminal Law Amendment Act* in 1969, the *Criminal Code* prohibited such gambling activities, with the exception of very small scale (i.e. with a $50 prize limit), occasional and private lottery schemes run for charitable purposes and lottery schemes operated at agricultural fairs. This prohibition was a longstanding one which had existed in Canada since before Confederation. Nonetheless, twenty years ago, Parliament changed the rules to allow legalized gambling in the form of lottery schemes. This amendment to the *Criminal Code* permitted the Government of Canada to conduct lottery schemes, but it also allowed the provinces to conduct or authorize such schemes. For example, it became lawful for a charitable or religious organization "under the authority of a licence issued by the Lieutenant Governor in Council of a province," to conduct and manage a lottery scheme in that province. More recently, late in 1985, Parliament divested the federal government of any capacity to conduct lottery schemes. The provinces now have sole jurisdiction.

As a consequence of this relaxation of the criminal law, legalized gambling has, since the early 1970s, 

3 S.C. 1968-69, c.38, s.13.  
flourished and become firmly established in Canadian society. Right across the country, the opportunity to wager money on lottery tickets is as close as the local corner store; in western Canada, facilities for playing bingo, blackjack and roulette are almost as convenient. In part, this reflects a general international trend. Similar developments have taken place in the United States, Australia and Europe. In Canada, however, this development took place in the absence of widespread public debate, political rationalization or academic analysis. There is not much known about how or why it came about, its legal validity, or what its implications are. This is somewhat surprising given the morally controversial nature of the subject matter: gambling has traditionally been condemned for subverting the Protestant ethic that life's rewards should result from hard work and merit, not mere chance.

The purpose of this thesis, therefore, is to address these neglected issues; to provide some understanding of how the legal status of lottery schemes was transformed, why it occurred, and what its consequences have been. Accordingly, the opening chapter surveys the roots of Canada's gaming laws in English statutory enactments, their transplantation to the North American colonies and their evolution during the one hundred years following Confederation. Chapter Two examines the political process which produced the amendments to the Criminal Code and the lack of public debate which
attended them. These two sections, combined, provide a contextual understanding of the decriminalization of lottery schemes. The third chapter, which reviews the contributions of the philosophy and sociology of law to our understanding of the nature and scope of the criminal law, provides the theoretical dimensions of the process.

Having examined how and why the rules of the game were changed, the second part of the thesis is devoted to an analysis of their most significant legal consequences. Chapter Four assesses the constitutional validity of the scheme that was adopted to permit the playing of lotteries and games of chance. The Canadian constitution, as it has been interpreted in the courts, is rather ambiguous regarding the categories of delegated, conditional and referential legislation, which will be shown to have implications for the status of the lottery scheme provision of the Criminal Code. In the succeeding chapter, another dimension of the constitutional issue is addressed: the impact of the amendment on the powers of Canada’s native peoples who, in recent years, have begun to look to gambling as a much needed, independent, source of revenue. Finally, attention is directed to the provincially-based regulatory structures which are implicit in the federal decriminalization scheme. These structures represent a further expansion of administrative action in contemporary Canadian society and their conformity with accepted
principles of administrative law is assessed. In sum the final three chapters discuss the major consequences of the legal transformation of lottery schemes. (6)

The picture that emerges at the end of this exercise is of a legal change significant in its own right and also in terms of its broader impact, which received virtually no prior consideration. It has produced questions and controversies which remain to be resolved, by litigation or legislation, more than two decades after the event. Undeniably, the legal status of lottery schemes in Canada has been transformed. This change of the rules is, however, legally problematic.

6 In this second half of the thesis, where reference is made to the provincial context, primary reference will be to the situation which prevails in British Columbia.
CHAPTER ONE
A HISTORY OF GAMING LAW IN CANADA(1)

The New World

Gambling was not brought to Canada by European settlers; laws to prohibit and control gambling were. Recounting his first meetings with the North American Indians while anchored at Sainte-Croix, Jacques Cartier noted the existence of premises used for the playing of games of chance, "where they gamble away all that they have, even the coverings of their nakedness."(2) A French dignitary, visiting the colony of New France in 1606, commented on the gambling proclivities of the Micmac Indians:(3)

I would add here, as to the practice of games of chance by our Savages, that they are so fond of it that they sometimes gamble all that they possess, even their wives .... In a dish they put a number of beans coloured and painted on one side, and having stretched

1 The general terms "gambling" and "gaming" are often used as synonyms, as they are in this thesis. Strictly speaking, however, not all gaming involves gambling, i.e. a game involving consideration, risk and a prize. Traditionally, the legally correct term is "gaming", although gaming laws actually target gambling. For further discussion of gambling semantics see Campbell, "Gambling in Canada" in Jackson and Griffiths, Criminology in Canada (Harcourt Brace Jovanovich, forthcoming).

2 Pouliot, La Grande Aventure de Jacques Cartier (Quebec, 1934) p.65.

out a skin on the earth, they play on it, slapping the skin with their dish, and by this means the beans jump in the air, and not all of them fall down on the coloured side, and herein lies the part of chance. And according to the gathering, they use a certain number of reed stems which they give to the winner to keep the score.

That gambling was widespread among the different Indian tribes is confirmed by the memoirs of Father Sagard who documented the importance of gaming in the customs of the Huron Indians. (4) To the south, the aboriginal peoples of what became New England were described at the time of settlement by the colonial governor as being "advanced gamblers". (5) Even in the isolated western reaches of the continent, anthropological and ethnological data confirm that the aboriginal inhabitants have participated in gambling games since time immemorial. (6)

Initially, the colonized Canadian territories known as New France were subject to French law. In his extensive history of the lottery in what is now the province of Quebec, Labrosse describes two early enactments relating to the control of gambling, one emanating from France, the other from the local colonial authority. The former, an edict issued in 1611 by Louis XIII, authorized raids on


gambling houses, ordering that "any person keeping a gambling den where cards or dice are played in his house may be held responsible for the players' losses". Further, "judges may go there to seize the money, rings and jewels or other things exposed for play ... and distribute the proceeds to the poor in the hospitals". (7) The latter enactment, one of the first regulations promulgated by the Council of New France in 1648, authorized the opening of a tavern in Quebec City but directed the owner that "he shall suffer no scandal or drunkenness, or blasphemy or cursing nor any games of chance in his house". (8) Despite such prohibitions, the early settlers continued to indulge in the gambling pastimes they had brought with them from Europe. According to the researches of one commentator, lotteries in particular were often used, with permission from the colonial authorities, for poor relief and to finance large projects and gaming flourished "at all levels of society". (9)

With the Treaty of Paris, 1763, which ceded the Franco-Canadian territories to Britain, French law became irrelevant. The Royal Proclamation of 1763 replaced the existing French law with English law in both civil and

7 Labrosse, The Lottery: from Jacques Cartier's day to modern times (Montreal: Stanke, 1985) p.33.

8 Ibid at 34.

9 Labrosse, supra fn. 7 at 36, 45.
criminal matters. Although French civil law was to be restored in Quebec by the **Quebec Act, 1774**, the criminal law was not. After the colonies were separated into Lower and Upper Canada in 1791 and given powers of local government,(10) the legislature of Upper Canada (now Ontario) chose to introduce English civil law as of October 1792 and to advance the date of reception of English criminal law to September 1792.(11) Thereafter, the colonial legislatures could augment the criminal law except insofar as such enactments were inconsistent with an Imperial law which by express words or necessary intendment was made applicable to the colonies.(12)

In the eastern Canadian colonies, which were generally regarded to have been acquired by Britain by settlement rather than by conquest, the settlers were considered to have brought with them the existing body of English law insofar as it was suitable for local conditions. Reception of new English law continued until the colony was granted a local legislature. For Nova Scotia, New Brunswick and Prince Edward Island this was to be the latter half of the 18th century. In Newfoundland a legislative assembly was granted in 1832. The dates of reception for western and northern


11 40 Geo.III, c.1, s.1 (U.C.) (1800).

12 **The Colonial Laws Validity Act, 1865** 28 & 29 Vict., c.63 (Imp.) clarified the applicability of Imperial and Colonial enactments in instances of conflict.
Canada were naturally later: 1858 for British Columbia and 1870 for the prairie provinces and the northern territories. (13)

Thus, English criminal law was to provide the foundations for the development of a Canadian criminal law. Accordingly, it is to a brief examination of the English criminal law pertaining to gambling and lotteries that this chapter now turns.

**Gambling and the Law In England**

English law is, of course, virtually synonymous with the term "common law" i.e. law which consists of the accumulated wisdom of centuries of judicial decisions rather than being created by legislative enactment. As Colvin notes, English criminal law in the 18th and 19th centuries was largely a matter of common law, constructed through judicial precedents. (14) The criminal law relating to lotteries and gambling, as well as to betting and wagering, that is, gaming in general, is, however, one of the few areas having a largely statutory genesis.

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Indeed, it is a widely circulated axiom that, at common law, all games were lawful except, perhaps, cockfighting. (15) Like most legal aphorisms, however, its simplicity is deceptive. It is perhaps more accurate to say that, at common law, the mere playing of games was lawful, but gaming which ran the risk of a breach of the peace, or other public nuisance was unlawful. In other words, although gaming per se was not viewed as unlawful, its collateral consequences often were. (16) Accordingly, keeping a common gaming house was an offence at common law, (17) and Bacon states that excessive gaming was also unlawful: (18)

It seems that by the common law the playing of cards, dice etc., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful nor punishable as any offence whatsoever .... from the destructive consequences of excessive gaming, both the Courts of law and equity have shown an abhorrence of it.


17 Blackstone, Commentaries on the Laws of England (Philadelphia: Rees Welsh, 1899) Book IV, p.1572. Blackstone classifies keeping a common gaming house as a public nuisance, an offence against "the public health and the public police or oeconomy".

18 Bacon, Abridgement 7th ed. (London: Strahan, 1832) Vol. IV, p. 17. In The Case of the Monopolies (1603) 11 Co.Rep. 84; 77 Eng. Rep. 1260, the Court, in an obiter comment remarked that "immoderate play" was contrary to the common law.
In his treatise of the law of gaming,(19) Street devotes much of his efforts to challenging the persuasive simplicity of the notion that, at common law, all games were lawful, which has been adopted in some judicial decisions.(20) For example, he notes that the earliest statute directed towards gaming, passed in 1388,(21) provided that labourers and serving men shall have bows and arrows and "leave tennis, football, coits, dice, casting of stone kailes, and other such importune games". A class of games was thus known as "importune" at this date. Accordingly, Street concludes, their character was determined by their harmfulness to the state and that this statute was declaratory and not in derogation of the common law.(22) This position supports the argument made elsewhere that, until the early 1700s, it was generally accepted that Parliament could not modify the basic principles of the common law and that early English statutes simply embodied it, rather than overruling it.(23) Although this issue of the status of gaming at common law is fascinating, it is ultimately of little relevance for the law of gaming. Even

20 e.g. Jenks v. Turpin (1884) 13 Q.B.D. 505 at 516, 523 per Hawkins J.
22 Street, supra fn. 19 at 5.
23 U.S. Department of Justice, supra fn. 16 at 3-4.
Street himself agrees that the law of gaming is largely a creature of statute. (24)

Although the earliest statute was, as was noted above, passed in 1388, and arose from a perceived military necessity as gaming apparently interfered with the pursuit of the martial arts, there were earlier ordinances directed towards gaming. In his History of Gambling in England Ashton points out that an edict was promulgated in 1190 for the regulation of the Christian army under the command of Richard I and Philip of France during the Crusade. It prohibited any person in the army, beneath the degree of knight, from playing at any sort of game for money. Knights and clergymen could play for money, but were not permitted to lose more than 20 shillings in a 24 hour period. The two monarchs had the privilege of playing for whatever sums they pleased. (25) Like much of the legislation which was to succeed it, this military decree attempted to proscribe gambling among the lower orders. (26)

Reviewing the legislation of the Tudor and Stuart monarchs, Holdsworth comments that the medieval ideas as to the need for separate rules for the different social classes

24 Street, supra fn.19 at (v).

25 Ashton, supra fn. 5 at 13.

26 e.g. 12 Rich.II, c.6 (1388) was directed at "labourers and serving men" and 17 Edw.IV, c.3 (1477) forbidding common gaming houses was directed at the veterans of the newly disbanded army.
were still recognized and enforced. Food and dress were still regulated with some minuteness "and games and pastimes which unprofitably occupied the time needed for military training, were prohibited".(27)

A key example of this is Henry VIII's statute of 1541, An Acte for Maytenence of Artyllarie and debarringe of unlawful Games.(28) All previous gambling enactments were amalgamated in this Act which enacted that:

no manner of artificer, or craftsman of any handicraft or occupation, husbandman, apprentice, labourer, servant at husbandry, journeyman, or servant at artificer, mariners, fishermen, watermen, or any serving man, shall from the said feast of the Nativity of St. John the Baptist, play at the tables, tennis, dice, cards, bowls, clash, coyting, logating, or any unlawful game, out of Christmas....

It also made it unlawful to maintain a house or place of dicing, carding or other gambling. Thus, although a game might not have been illegal per se, illegality attached if it were played for money in public or in a gaming house. This confirmed an important distinction between public gaming and gaming in private. This legislation was to remain one of the central enactments for the control of gaming until 1845 when it was repealed and partially re-enacted by the Gaming Act.(29) In the intervening years, the efforts of Parliament were directed at proscribing new games which

28 33 Hen.VIII, c.9 (1541).
29 8 & 9 Vict., c.74.
appeared with regularity,(30) at the effects of gambling among the upper classes, and at lotteries.

After the Restoration, gambling became increasingly popular among the aristocracy. In his study of the social and legal history of gaming from 1660 to 1845, Miers notes that although it was effectively suppressed by Cromwell, the Restoration brought with it the phenomenon of 'deep gaming', that is, "continuous gaming over prolonged periods of time for high stakes, usually cash or securities on land".(31) This development had serious consequences in what was essentially a land-based society. It resulted in large transfers of wealth, uncontrolled exchanges of mortgages, bonds, conveyances and other securities. As Blackstone observes, "among persons of superior rank [gaming] hath been frequently attended with the sudden ruin and desolation of ancient and opulent families".(32) The earlier concern with the effects of gambling on military readiness was replaced by a focus on its consequences for the propertied classes.

30 e.g. 12 Geo.II, c.28 (1739) prohibited ace of hearts, pharoah, basset and hazard. A year later, 13 Geo.II, c.19 (1740) prohibited all games involving dice, except backgammon.


32 Supra fn. 17 at 170.
This provoked legislation aimed at cheating at play which was apparently widespread, (33) and at excessive gambling. Unlike the enactments directed at gambling among the lower classes, however, these provisions were largely civil in nature. An Act against deceitful, disorderly and excessive gaming was passed in 1664. (34) It provided that the victim of cheating or fraud could sue for three times the sum lost, sharing the sum so recovered with the Crown. If the victim failed to sue within six months of the loss, then during the next year "any person" was permitted to sue in his place and recover the loser's share as a reward. It further declared that all securities in excess of one hundred pounds sterling for gaming debts incurred "at any one time or meeting" were void and unenforceable. These provisions were strengthened in 1710 by An Act for better preventing of excessive and deceitful gaming, (35) which set out what were to be the standard principles regarding gambling contracts and debts in English civil law. All notes, bills and securities relating to gambling debts were void; anyone losing ten pounds sterling or more could sue and the premium for fraud was increased to five times the sum so acquired.

33 Miers, supra fn. 31 at 7.
34 16 Car.II, c.7 (1664).
35 9 Anne c.14 (1710).
As to the success of these measures, Miers observes,(36)

These provisions are, given the conditions for the creation and enforcement of the law at the time, remarkable and imaginative ways of coping with a serious problem, but they do not appear to have enjoyed complete success. Starting from the premiss that card-playing or dicing were themselves unlikely to diminish without some external pressure, the legislative tactic was simply to make it financially unattractive to gamble on their outcome .... But these emasculating provisions also had a liberating effect, since for the purposes of gambling transactions, money or its surrogates assumed a fictitious quality: they facilitated the gaming without transferring anything of value between the players. The scarcity of actions .... suggests that, for many, gaming losses were indeed met as a matter of honour; the protection afforded to securities, on the other hand, does appear to have been a success. Although there were many who were ruined by deep gaming, this ruination did not inevitably result in the wholesale transfer of real property.

Similarly, it was Blackstone's assessment that, although the legislation directed towards gaming was copious, it met with little success due mainly to the prevailing public sentiment regarding such pastimes and the efforts of "our magistrates in putting those laws in execution".(37) Indeed, a survey conducted by a Select Committee of the House of Lords found that between 1662 and 1843 there were only 116 trials of unlawful games, and 44 actions on the enforceability of securities.(38)

36 Supra fn. 31 at 7-8.
37 Supra fn. 17 at 173.
Regarding the limited utility of legislative attempts to eradicate gambling, Holdsworth postulates that it is "the natural instinct of mankind to gamble and bet". Accordingly, the most that can be achieved by legislation is that excessive gambling should be made more difficult. He continues on a prophetic note,(39)

Moreover, if, as in these cases of gambling and betting and drinking, practices exist which are not per se immoral, and are so deeply rooted in man's nature that they cannot be wholly suppressed, it is legitimate for the state to make some profit for itself by permitting their indulgence at a price."

Finally, he laments the abandonment of state lotteries, for, by the time he was chronicling the history of English law, private and public lotteries had been abolished, largely due to the widespread fraud and corruption attending them. His position, which was to be ultimately accepted in Canada, though not in Britain, was that state lotteries would be no worse than the evils of illicit lotteries and "at least the profits accruing would be devoted to worthy causes".(40)

Private lotteries were not unknown in England in the late Middle Ages, but they were forbidden by Royal proclamation as early as 1621.(41) The first state-authorized lottery was launched in 1566 in order to finance

39 Holdsworth, supra fn. 27 at 542.

40 Ibid at 543.

41 Street, supra fn. 19 at 205.
the repair of harbours and other public works projects. (42) Lotteries quickly came to be viewed as a form of monopoly within the Royal Prerogative, hence the proscription of private schemes. A lottery could only be run after its promoters had secured a patent from the Crown. Other early lotteries were used for such projects as the Virginia plantations and improving the London water supply. They performed the function of modern-day taxation.

In 1699 all lotteries were declared to be public nuisances and were subject to a blanket prohibition. In the future, the only permitted lotteries would be those authorized by an Act of Parliament. (43) Using this power, state lotteries were revived in 1710 and, except from 1814-1819, they were held annually until 1823 when they were finally abolished by the **Lotteries Act, 1823.** (44) They had become the target of growing criticism from both inside and outside of government. Writing in 1776, the economist Adam Smith denounced the lottery as an inherently losing venture for the participants: (45)

> The chance of gain is by every man more or less overvalued, and the chance of loss is by most men undervalued ... that the chance of gain is naturally

42 This first state lottery is discussed extensively in Ashton, *supra* fn. 5 at 222-224.

43 **Lotteries Act** 10 & 11 Will.III, c.17.

44 4 Geo.IV, c.60.

overvalued, we may glean from the universal success of lotteries. The world never saw, nor ever will see a perfectly fair lottery; or one in which the whole gain compensated for the whole loss; because the undertaker would make nothing by it .... The more tickets you [wager]...upon, the more likely you are to be a loser. Buy them all and you are sure to lose.

A House of Commons Committee, which was appointed in 1808 to study lotteries, concluded that "the foundation of the lottery system is so radically vicious, that your Committee feel convinced that under no system of regulations, which can be devised, will it be possible to adopt it as an efficacious source of revenue, and, at the same time, divest it of all the evils which it has, hitherto, proved so baneful a source".(46) After some delay, Parliament finally acted on the Committee's recommendation to abolish lotteries in Britain and they have never been reinstated there.

By the end of the 18th century, therefore, when the Canadian colonial legislatures were beginning to enact their own laws, building on the received English criminal law, there was a well-established, though not wholly effective tradition of prohibiting gambling in its various forms at common gaming houses, and public lotteries were falling into disfavour.

46 Cited by Ashton, supra fn. 5 at 238.
The Legal Status of Gambling in Pre-Confederation Canada

In Lower Canada (Quebec) there was an attempt in the early 1800s to reinforce the imperial prohibition of gambling in common gaming houses. An Act More Effectively to Provide for the Regulation of the Police in Quebec, Montreal and Trois-Rivieres etc. (47) empowered local justices of the peace to impose penalties on "the pernicious vice of gaming which has become extremely prevalent in public houses". In a curious echo of earlier English legislation, these anti-gambling provisions were directed at

any gaming in any house, out-house, apartment or ground belonging to or in his or her occupation, for money liquor or otherwise, either with cards, dice, draughts, shuffle-board, skittles, nine-pins, or with any other implement or in any other manner of gaming, by any journeyman, apprentice, labourer or servant ... (emphasis added).

After Upper and Lower Canada were amalgamated into the Province of Canada under the Union Act, 1840, the legislature, in what was essentially a liquor licensing statute, enjoined "the keeper of every licensed inn ... or other house or place of public entertainment" to keep a "peaceable, decent and orderly" house and not to allow any person "to play any game whatsoever at which money or any thing which can be valued in money shall be won or lost". The terms of gambling prohibitions were becoming much broader, in that any game involving money was proscribed. At the same time, their geographical scope was also expanding.

47 57 Geo.III, c.16 (1817) (Lower Canada).
Regarding lotteries, the situation was more complex. Under received English law, lotteries were a public nuisance unless authorized by the Crown. Fairly frequent resort was made to these enabling powers. In 1783, for example, Governor General Haldimand approved a petition from the legislative council of Lower Canada seeking permission to organize a lottery to raise funds to build a prison in Montreal. Over 4,500 pounds net was raised for this project through the lottery.(48) In 1819, the legislature of Nova Scotia passed an Act authorizing a lottery to raise money to build a bridge over the river Avon.(49) The colonial governments found themselves having to rely on lotteries for much the same reason as England had had to in the 16th and 17th centuries: there was no alternate source of public funding. In a new country with few sources of capital, there

48 Labrosse, supra fn. 7 at 57 quotes from a letter sent by Haldimand to Lord North in London in which he states, "I had some reluctance to give my assent to the Ordinance for raising by a lottery a sum of money for the purpose of building a prison at Montreal, but as a prison was necessary as I think it was very unjust that the money of the British nation should be employed in providing local conveniences for the inhabitants of this province, I gave my assent to it."

49 1819 Nova Scotia Statutes at Large v.3,(1817-1826). As early as 1781, the Lieutenant Governor of the province had authorized the raising of funds by lottery for the building of a public school in Halifax. The text of this royal proclamation is set out in full in Canada. House of Commons Debates (1934) 5th Sess. 17th Parl. Vol. III p, 3308.
was little choice but to raise money for public works by this method. (50)

It has been noted that, in the American colonies, one of the primary functions of lotteries was to provide a way for individuals to dispose of property in the face of a chronic currency shortage. It was difficult to find buyers with enough cash to purchase a large item which resulted in houses and real property being disposed of through private lotteries. (51) The evidence available suggests that the situation was no different in the Canadian colonies. Certainly, the initial distribution of land to settlers was often done by lot. For example, a government study of land settlement in Upper Canada in the post-Revolutionary War era describes the allotment of land to Loyalists and ex-military men as follows: (52)

The procedure in actually allocating these lands was very simple ... Where a surveyor placed a number of settlers together on the land, they drew lots for their respective sites. After twelve months' occupation, the holder of a certificate was considered entitled to a permanent deed.

50 A similar situation prevailed in the American colonies where many famous public institutions such as Columbia, Harvard and Yale universities were established by funds raised through lotteries: U.S. Department of Justice, supra fn. 16 at 75.


52 Ontario Department of Archives, Sixteenth Report: Land Settlement in Upper Canada 1783-1840 (by G.C. Paterson) (Toronto: King's Printer, 1921.)
Similarly, in describing the settlement of certain parts of Upper Canada, Guillet notes that in Glengarry County, for example, each township was assigned to a corps, the lots were then numbered and placed in a hat and each soldier in turn drew his grant. (53)

It was a short step from distributing land by lot to disposing of it by lottery, which, strictly speaking, was illegal under imperial law. Many settlers did not remain long on their initial grants of land, relinquishing them almost immediately. Again, the shortage of cash made lotteries a popular method for disposing of land. Further, gambling in land grants was established very early in Canada. (54) Accordingly, in 1856, the Legislative Assembly of United Canada passed An Act for the Suppression of Lotteries. (55) The preamble asserted the desirability of prohibiting "the practice of selling lands, goods and chattels by lot or chance". Without exception, the Act forbade the sale, barter, exchange or other method of disposal of any property "by lots, tickets, or any mode of chance whatever". Any lottery transaction was declared void, and the property involved forfeited "to such person as shall


54 Ibid at 53, 342. Guillet notes that land grants were often wagered at horse races in the "backwoods settlements" of Richmond, Perth and Bytown.

sue for the same by action" though no such forfeiture could affect the right or title of a bona fide purchaser for value.(56) Its terms were absolute.

One commentator notes that these measures emanated from a legislature dominated by English, Protestant politicians who chose to override the interests of the French Catholic clergy which, for decades had been financing "good works" through lotteries and bazaars.(57) Within four years, however, the total prohibition was relaxed to permit raffles for prizes of small value i.e. not exceeding $50, at bazaars held for charitable objects, as long as the permission of the municipality was first obtained.(58) Thus, the legislative assembly explicitly established a scheme which, with minor modifications, was to remain in place for over a century: the prohibition of all lotteries and other games of chance with the exception of small-scale charitable operations under municipal control.

56 In 1864 legislation was enacted to make clear that land which had been acquired by lottery or chance prior to the 1850 legislation would not be disturbed: An Act to Quiet Titles to Certain Properties Sold by Lot S.C. 1864, c.32.

57 Labrosse, supra fn. 7 at 82. An American commentary notes that Catholics have traditionally been the religious group least opposed to gambling, with their official position being one of acceptance if moderation is practiced and fraud is not involved: Weinstein and Deitch, supra fn. 51 at 8. Over the next one hundred years, the Catholic Church and the largely Catholic population in Quebec would be consistently supportive of lotteries.

58 An Act to Amend Chapter 95 of the Consolidated Statutes of Canada etc. S.C. 1860, c.36.
Confederation to Codification

In 1867, the British North America Act (59) united the provinces of Nova Scotia, New Brunswick and Canada (Quebec and Ontario) "under the name of Canada". The other regions of Canada joined the union at various points between 1871 (British Columbia) and 1949 (Newfoundland). A federal system was adopted for the Dominion of Canada, which made the distribution of powers between the central and provincial levels of government a key element of the 1867 Act (60). For present purposes it is important to note that s.91(27) of the Act grants the federal Parliament the exclusive power to legislate in relation to criminal law and procedure. As well, Parliament has the residual power to secure the peace, order and good government of Canada. The provincial legislatures, on the other hand, have jurisdiction over property and civil rights in the province (s.92(13)) and a residuary power over matters of a merely local or private nature in the province (s.92(16)). Consequently, the criminal prohibition of gambling and lotteries was a matter for the federal government of Canada. Nonetheless, in the

59 30 & 31 Vict.,c.3. This statute is now known as the Constitution Act, 1867.

60 For a more detailed discussion of the British North America Act and Canadian federalism, see Hogg, Constitutional Law of Canada (Toronto: Carswell, 1977) chaps. 2-3.
years immediately following Confederation, provincial legislatures continued to legislate in relation to gambling.

Provincial enactments originating in Nova Scotia and Ontario were designed to repress gambling. For example, in legislation protecting public morals, the Nova Scotia legislature penalized keeping a common gaming house as well as running or taking part in a lottery or raffle. For example, in legislation protecting public morals, the Nova Scotia legislature penalized keeping a common gaming house as well as running or taking part in a lottery or raffle. (61) Ontario targeted gambling in its liquor licensing and Sunday observance legislation. The former penalized a license-holder who permitted gambling on the premises, (62) and the latter forbade gambling with dice, foot and horse races on Sundays. (63) These developments resulted partly from the fact that it took the federal government almost ten years to produce legislation directed towards gambling and partly from the overlap between gambling and other activities, such as liquor control, which were within provincial jurisdiction.

Legislation enacted in Quebec, by comparison, was qualitatively different in that it was permissive in nature. An Act to Amend the Laws Respecting Bazaars and Lotteries

61 R.S.N.S. (5th ser.) 1884, c.160.
62 The Liquor License Act R.S.O. 1887 c.194, s.73.
63 The Lord’s Day Act R.S.O. 1887, c.203. Provincial Sunday observance legislation was declared to be ultra vires in Attorney General of Ontario v. Hamilton Street Railway [1903] A.C. 524 (P.C.) and was replaced by a similar federal enactment.
passed by the Quebec legislature in 1869, (64) expanded the exceptions to the Suppression of Lotteries Act, 1856 found in the Act of 1860. The principle section reads,

Notwithstanding every provision to the contrary ... whenever it is intended to hold a bazaar or lottery, the object whereof is to assist in the construction or support of any church, chapel, or other religious building, of an hospital, of an asylum, or any charitable establishment whatever, or of any educational establishment, or of a colonization society, within the limits of this province, or to aid in the payment of the debt thereof, such bazaar or lottery may take place without any restriction as to amount; provided the things offered or to be disposed of by lottery do not consist of sums of money, notes, bank-notes, bonds, debentures or other negotiable securities of like nature.

The terms of this amendment are undeniably broad. According to one observer it resulted from the restoration of an autonomous legislature in Quebec which was strongly influenced by the Catholic Church. The elimination of the $50 restriction on the value of prizes facilitated the creation of huge lotteries run by the Church: (65)

Quebec thus dissociated itself clearly from the laws that continued to prevail in the other provinces of the new Confederation, all of which strictly observed the restrictive law of 1860, right down to the year 1970.

By 1875 the Parliament of Canada had begun to direct its attention towards gambling. Its first target was a traditional one: common gaming houses. The Suppression of Gaming Houses Act prescribed extensive police powers of entry search and seizure in relation to common gaming houses

64 S.Q. 1869, c.36.

65 Labrosse, supra fn. 7 at 83, 84.
and facilitated prosecution and conviction by creating statutory presumptions regarding evidence of gaming and of what constitutes a common gaming house. For example, "any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game" is, under s.3 of the Act, evidence that the house, room or place where they are found is used as a common gaming house, "until the contrary be made to appear". Further, the willful obstruction of "any constable or officer" seeking to enter a place suspected of being a common gaming house creates an evidentiary presumption that such place is, absent proof to the contrary, a common gaming house.\(^{66}\) A subsequent amendment added the punishment of persons found in a common gaming house.\(^{67}\)

There were two additions to the federal law on gaming in 1877: an enactment to repress betting and pool-selling with the exception of bets between individuals, i.e. private wagers,\(^{68}\) and a more unusual prohibition of gambling on certain public conveyances,\(^{69}\) which remained on the


\(^{67}\) The Suppression of Gaming Houses Amendment Act, S.C. 1877, c.33, s.4.

\(^{68}\) The Repression of Betting and Pool-selling Act, S.C.1877, c.31.

\(^{69}\) The Prevention of Gambling Practices in certain Public Conveyances Act, S.C. 1877, c.32.
statute books until 1986.(70) When the latter was given first reading in the House of Commons it was explained that such a law was necessary because the managers of certain large railways were complaining about the activities of "three card monte men" i.e. card sharps on their trains.(71) When the Bill was considered in committee, there was a lively discussion as to whether this legislation could or should apply to British Columbia. The debate is reported as follows:(72)

Mr. Bunster said the miners of British Columbia must have something to amuse themselves with ... [they] travelled a great deal on steamboats, and had to wile away the hours somehow. The miners were the bone and sinew of the country and delivered vast wealth from the bowels of the earth ... Sir James Douglas, one of the best of Governors, said: "Let the boys enjoy themselves", and this was the correct principle. He doubted very much whether the Dominion had the right to interfere with the Province in these matters.

The Government's response was that there would be no special rule for British Columbia. Nonetheless, as it was not intended to apply the law to steamboats immediately, despite the express terms of the legislation, and as there were no railways in that province at the time, "at present [the Act] would not apply to British Columbia". (73) It was passed into law in March 1877.

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70 S.C. 1985, c. 52.

71 Canada, House of Commons, Debates (1877) 4th Sess. 3rd Parl. 338.

72 Ibid.

73 Ibid.
The next legislative development was the further amendment of the Suppression of Lotteries Act, 1856. In 1883, provision was made to permit any incorporated society, "established for the encouragement of art" to distribute works of art by lottery. (74) This mirrored a British statute of 1846 which legalized lotteries run by Art Unions "for the encouragement of the fine arts". (75)

The Statutes of Canada were revised in 1886. The amended 1856 Act was amalgamated with the Repression of Betting and Pool-selling Act, 1877 to become the Lotteries, Betting and Pool-selling Act (76) and the legislation respecting gaming houses and gambling on public conveyances was reinacted virtually unchanged. (77)

The final enactment relating to gambling prior to the codification of the criminal law in 1892 was a statute targeting gaming in stocks and merchandise. (78) The Preamble states:

Whereas gaming and wagering on the rise and fall in value of stocks and merchandise are detrimental to commercial and public morality, and places affording facilities for such gaming and wagering, commonly

74 Lotteries Amendment Act, S.C. 1883, c.36.
75 9 & 10 Vict., c.48 (1846).
76 R.S.C. 1886, c.159.
77 R.S.C. 1886, c.158 and c.160, respectively.
78 The Gaming in Stocks and Merchandise Act, S.C. 1888, c.42.
called bucket shops, are being established; and it is expedient to prevent such gaming and wagering ... 

What is being prohibited here is not, of course, simple speculation on the Stock Market, but market rigging and what are known as difference transactions, whereby a person intends to gain from the rise or fall in the price of stocks and shares without any intention of ever acquiring the same. They are fictional transactions against the clock. As one commentator notes, the Stock Exchange and its operations to a considerable extent lie on the borderland of the subject of gambling. At the end of a speculative sale or purchase, the result to the speculator may be the same as if he had entered into a mere difference transaction, "but he has employed a different machinery, and has utilized separate legal obligations which could have been specifically enforced, or for a breach of which damages could have been recovered."(79)

The Criminal Code of Canada (80)

The legislation enacted in 1892 is a code in name only. Unlike the codes found in civil law jurisdictions, it is not organized around, and derived from, articulated rational principles, which are adhered to consistently and coherently


80 S.C. 1892, c.29.
throughout the body of the code. Rather, it is a body of law which represents a compromise between law derived from a common law heritage and a true code. The **Criminal Code of Canada** is simply a compilation of the criminal law (common law and statute) as it existed in 1892.

In introducing the Bill into the House of Commons, its government sponsor, Sir John Thompson explained its genesis:(81)

[W]hile we retained all the parts of our criminal law which we found in the Revised Statutes that seemed to be particularly applicable to Canada, we had in all other portions of the measure followed the labours of the Commission in Great Britain which was appointed to establish a criminal code, following particularly the latest revision of their work.

The work to which he refers is that of Sir James Stephen, whose efforts to have the English criminal law codified were to be unsuccessful. His endeavours met with greater success in Canada.

Indeed when those portions of the first **Criminal Code** that are devoted to gambling are examined, Stephen’s influence is evident. As in his **Digest**, gambling offences are classified as common nuisances; common gaming and betting houses are, along with common bawdy houses,

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designated as disorderly houses and Stephen's definition of
a common gaming house is adopted:(82)

s.196. A common gaming-house is -
(a) a house, room or place kept by any person for gain,
to which persons resort for the purpose of playing at
any game of chance; or
(b) a house, room or place kept or used for playing
therein at any game of chance, or any mixed game of
chance or skill, in which -
   (i) a bank is kept by one or more of the players
   exclusively of the others; or
   (ii) in which any game is played the chances of
   which are not alike favourable to all the players,
   including among the players the banker or other person
   by whom the game is managed, or against whom the game
   is managed, or against whom the other players stake,
   play or bet.

Otherwise, the gambling provisions of the first Criminal
Code were simply an amalgamation of the relevant chapters of
the 1886 Revised Statutes and the Gaming in Stocks and
Merchandise Act, 1888.(83)

82 c.f. Stephen, A Digest of the Criminal Law (London:
Macmillan, 1877) article 181:
"A common gaming house is a house kept or used for playing
therein at any game of chance, or any mixed game of chance
and skill, in which
   (i) A bank is kept by one or more of the players, exclusively
   of the others; or
   (ii) In which any game is played the chances of which are not
   alike favourable to all the players, including among the
   players the banker or other person by whom the game is
   managed, or against whom the game is
   managed, or against whom the other players stake, play or
   bet."

Stephen notes in the appendix (Note XII) that "[t]here
is a good deal of difficulty of bringing into a clear and
systematic form the provisions of the various statutes
relating to the suppression of disorderly houses, and
especially gaming houses." The complexity of gaming
legislation is a recurring theme in its history.

83 The only provisions of this earlier Canadian legislation
not to be repealed and replaced by the provisions of the
Criminal Code were those sections of the Gaming Houses Act,
ss.9 & 10, which enabled a magistrate to compel those
individuals found in a common gaming house to give evidence
When the **Criminal Code** was debated in the House of Commons, the gambling sections received very little attention. The limited consideration they did receive was directed mainly at the sections relating to gambling on public conveyances. One Member criticized them as "unnecessary legislation": (84)

People can take care of themselves just as well in a railway carriage as they can in a club or private house. I do not think the section is a good one. If a man chooses to play for a dollar or two in a railway car, and loses it, let him lose it and have done with it. I object to having laws on our Statute-book which are not observed. Constant legislation against social habits which is not enforced is calculated to bring the law into contempt.

This, however, was the only question directed towards the necessity for, and utility of, the criminal sanctioning of gambling. The codification of Canada's criminal law brought with it no major departures in this sphere. Nonetheless, it did finally re-align the situation in Quebec with that prevailing in the rest of the country.

From 1869 to 1892, the Quebec government had effectively ignored the federal prohibition of lotteries, relying on the more permissive provincial legislation. This was challenged in the Quebec courts in May, 1892, at the same time that the **Criminal Code** was being debated in the House of Commons. It was, in all probability, a test case to regarding the activities therein, and to relieve such witnesses of any criminal liability for those actions.

84 Canada. House of Commons *Debates*, supra fn. 81 at 2976.
determine the fundamental issue of jurisdiction over lotteries, pending the enactment of the Criminal Code. In R. v. Harper,(85) the defendants, lottery organizers, who were charged with an infringement of the federal Lotteries, Betting and Pool-selling Act, argued that such legislation was ultra vires the Federal Parliament. They asserted that legal controls on lotteries were not true criminal offences, but "simple infractions" which were within the exclusive domain of the provincial legislature. This rationale was rejected by the court which endorsed federal paramountcy in the field:(86)

[I]t cannot be denied that the Federal Parliament, in which each province is represented, has the power to declare obnoxious, injurious or mischievous anything which it may believe to be so in the interest of the Dominion at large .... the Federal Parliament had implicitly the right to consider lotteries in general, contrary to good order and the interests of the public, to legislate against them ....

This judgement, and the passage of the Criminal Code which soon followed, made it clear that, subject to the minor exceptions contained in s.205 of the latter, lotteries and other games of chance were illegal across Canada. For almost eighty years, this situation was to remain virtually unchanged.

85 (1892) 15 The Legal News 179 (Quebec Magistrates Court).
86 Ibid at 184-185 per Magistrate Dugas.
Tinkering with the Law

After the enactment of the first Criminal Code, the provisions relating to gaming were, until 1969, subject only to fairly minor revisions. (87) For example, s. 205, which prohibited lotteries with certain enumerated exceptions was amended in 1900 (88) to provide that small scale raffles could be conducted at any bazaar held for any "charitable or religious object". Previously, s.205(6)(b) had referred only to bazaars for "any charitable object". At the same time, however, the exception found in s.205(6)(c), permitting "any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings" was repealed.

From a reading of the debates in the House of Commons on this issue, it would appear that this exemption had been a source of controversy since soon after the Criminal Code was enacted and it was first applied in Quebec in the wake of the decision in R. v. Harper. In 1894, a Criminal Code (Amendment) Bill which proposed to prohibit the art lotteries received first reading,(89) but it did not proceed

87 The only major change that occurred was in relation to betting on horse races, the invention of the totaliser and the introduction of on-track, pari-mutuel betting: S.C. 1910, c.10, s.3; S.C. 1913, c.13, s.13; S.C. 1920, c.43, s.6; S.C. 1922, c.16, ss.12 and 13; S.C. 1923, c.41, ss. 3,5 and 6.

88 S.C. 1900, c.46, s.3.

89 Canada. House of Commons, Debates 4th Sess. 7th Parl.(1894) Vol. I, p.364-5. This Bill also proposed to
any further in the legislative process. Then, during parliamentary debates in May, 1899, a question was directed to the government as to its intention to respond to lotteries in Montreal disguised as associations for the promotion of art. The Prime Minister, Sir Wilfred Laurier responded that this problem would be dealt with in amendments which were then in preparation and which were to be enacted in the Criminal Code (Amendment) Act, 1900. (90) Art lotteries were prohibited, but at the same time, the Code was clarified vis-a-vis church raffles. That the thrust of the prohibition of art lotteries was directed mainly at Quebec is confirmed by the fact that, in 1906, s.205 was further amended to provide that the prohibition of lotteries did not apply to "the Art Union of London, Great Britain, or the Art Union of Ireland", (91) bodies which functioned almost exclusively in English-speaking Canada.

In the 1906 revision of the Criminal Code, the gaming sections were left largely untouched. The most significant change was the appearance of the term "lottery scheme", as opposed to the simple "lottery", in the side-headings of prohibit "church raffles and lotteries permitted under s.205(6)(b)".


91 S.C. 1906, c.6. This focus on Quebec is also evidenced by the deletion in 1901 of the exception from the lottery prohibition for "the Credit Foncier du Bas-Canada, or the Credit Foncier Franco-Canadien": S.C. 1901, c.42.
s.236 (formerly s.205). This expression was to become extremely important in Canadian law, particularly after 1969, and was ultimately interpreted to encompass not only lotteries, but also other games of chance such as bingo, blackjack and roulette. Thus, as early as 1922, the scope of the so-called "lottery section" of the Criminal Code was broadened in scope to penalize anyone who

- disposes of any goods, wares or merchandise by any game or mode of chance or mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

- or who

induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, shell game, punch board, coin table or on the operation of any wheel of fortune.

This amendment was itself soon revised to allow many of the games proscribed therein to be played at agricultural fairs or exhibitions. When this proviso was first introduced in the House of Commons, the Minister of Justice advised that the Department of Agriculture had recommended it, believing it to be necessary if agricultural fairs and exhibitions were to survive financially. These fairs and exhibitions were permitted at such fairs and exhibitions.

92 S.C. 1922, c.16, s.11.

93 S.C. 1925, c.38, s.4 added a proviso to s.236(1) that the provisions of these two paragraphs did not apply to agricultural fairs or exhibitions "insofar as they do not relate to any dice game, shell game, punch board or coin table". In other words, disposing of goods etc. by games of chance in which the competitor pays money to enter, and staking money on a wheel of fortune were permitted at such fairs and exhibitions.
exhibitions were seen to be crucial in the development and maintenance of interest in agriculture.(94) This recommendation passed into law in 1925 and remains in effect.(95)

During the economic depression of the 1930s, there was a re-examination of the desirability of state lotteries in Canada.(96) In some quarters, they were seen as a potential source of revenue for hospitals and other financially deprived social programs, and pressure for their legalization came from all levels of government. At the municipal level, for example, the Mayor of Montreal advocated a national lottery to help the unemployed at a meeting with the mayors of Ontario in 1929, and in 1933, Montreal’s city council unanimously adopted a resolution urging the provincial government to lobby Ottawa for a lottery to benefit the unemployed.(97) The popularity of lotteries in Quebec had never really abated, the

95 Criminal Code of Canada, R.S.C. 1985, s.206(3) and s.207(1)(c).
96 A similar re-evaluation took place in Britain, in light of the introduction of the famous Irish Sweepstakes in 1930: Great Britain Royal Commission on Lotteries etc. Report (London: H.M.S.O.,1932). The Royal Commission ultimately recommended against reinstating state lotteries. In the United States, beginning in the Depression and continuing during the Second World War, federal and state lottery bills began to be introduced in Congress and the state legislatures: Weinstein and Deitch, supra fn. 49 at 14.
97 Labrosse, supra fn. 7 at 108, 110.
prohibitions in the **Criminal Code** notwithstanding, but the call for a state lottery also came from other regions of the country. In Vancouver, for instance, a plebiscite was held in 1932 on the question

Are you in favour of legalized sweepstakes, to be operated under the direct control of the British Columbia government for the benefit of hospitals within the province?

The vote was 25,735 to 9,777 in favour of such a lottery.

During the early 1930s there were several attempts to introduce legislation authorizing hospital sweepstakes (a form of lottery) in Canada by the fairly unusual route of bills introduced in the Senate, rather than in the House of Commons. The first, in 1931, was rejected by the Upper House; the second, in 1933, progressed to the Commons where it was shelved indefinitely; the third, in 1934, met with a similar fate, but it was discussed extensively in the House of Commons before it too was allowed to lapse.(98)

This was the most extensive public debate on lotteries in Canada up to that point and is therefore worth close examination. The Prime Minister, the Hon. R.B. Bennett permitted government members a free vote, according to their

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98 The chronology of these bills and their progress through Parliament is discussed extensively in the debates in the House of Commons: Debates (1934) 5th Sess. 17th Parl. Vol. II, p. 2164 and Vol. III, pp. 2119 and 3277-3323. A private member's bill to amend the Criminal Code to permit provinces to conduct lotteries for "educational or public charitable purposes" was also introduced in the Commons in 1934, but it failed to receive second reading: Vol. III, pp 3476-77.
individual views, and set aside a day, May 22, 1934, for discussion of the **Hospital Sweepstakes Bill**. As one of the Members of Parliament pointed out, however, this arrangement effectively gave the House "an opportunity to pronounce not so much on every detail of this bill as on the question of lotteries in general."(99)

The purpose of the Bill itself was to empower the attorney general of any province to authorize a committee to conduct sweepstakes or lotteries within the province for the benefit of hospitals. The most vocal support for the Bill in the House came from Quebec, where the provincial government had recently enacted legislation authorizing a provincial lottery, contingent on complementary federal action,(100) and also from British Columbia. Advocates and critics of the Bill frequently relied on very similar arguments - historical, moral, social and fiscal - indicating the malleability of the issue. These same arguments were to be invoked again in the 1950s and 1960s, but with different results.

Those in favour of the hospital sweepstakes proposal generally dismissed assertions of gambling's immorality as an irrelevant issue: public opinion was certainly divided

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99 **Ibid** at 3295 (Hon. F. Rinfret).

100 **An Act to Authorize the Organization of a Lottery for Educational and Public Purposes** S.Q. 1934, c. 6. This Act was never proclaimed into force.
and legislation was not going to cure this one way or the other. The existing prohibitory law was ineffective. Lotteries, particularly foreign lotteries such as the Irish Sweepstakes still thrived in Canada, albeit illicitly. The legalization of the domestic sweepstakes would impose stringent controls as the same time as it would preserve respect for the law. The failed experiment with the prohibition of liquor and the policy of state control which replaced it was cited approvingly by those espousing the sweepstakes' cause.

Lotteries in aid of hospitals would do much to mitigate the effects of the Depression, it was argued. It would be a "voluntary tax" in an economy that could not absorb any further compulsory taxation. At the same time, it would remove the class barriers to legal gambling pastimes:(101)

A lottery is to the ordinary citizen what horse racing is to society ... Speculators have the stock markets and exchanges for gambling in stocks and shares. These resorts are not available to the plain, every day, citizen ... it is harsh discrimination that the day labourer on the farm, forest, mine, or high seas, is the only one who is to be legislated out of the opportunity for indulging in this mild form of gambling.

It was also pointed out that lotteries had a long pedigree in Britain and Europe and were enthusiastically supported by the citizenry of many countries, world wide.

101 Canada. House of Commons, Debates, supra fn. 96 at 3278-79 (J.A. Fraser).
Among the supporters of the Bill from Quebec, there were those who thought that it did not go far enough; that lotteries should not be restricted to the support of hospitals and that there should be a national lottery rather than a number of provincial sweepstakes. Quebec's evident desire for some form of state-run lottery was an influential factor in the parliamentary debate, but on both sides of the issue. A Member representing an Ontario riding described the resulting tension as follows:(102)

The bill under discussion is important also for the reason that it comes with endorsement of one of the provincial legislatures. Naturally, when a bill comes so endorsed it is incumbent upon [us] to pay due consideration to the recommendations of that body. This is a confederation of provinces and the action of the province must of necessity be given consideration. When a province indicates its desire to deal with questions that it believes to be entirely in its own interests, we have a right, if the unity of confederation is to be preserved, to pay attention to its demand. On the other hand, if we are to preserve harmony in our confederation, no one province has a right to force upon the dominion a condition of things that is abhorrent to a great number of its citizens ....

Among the opponents to the Bill it is clear that the recent decision of a Royal Commission in Britain not to reinstate lotteries in that country was much more persuasive than public sentiment in Quebec. The opposition of the Anglican and United Churches to the proposal on moral grounds was also cited. Repeated reference was made to the historical experience with lotteries and their eventual abolition in 'enlightened' countries. It was pointed out 102 Ibid at 3310 (J.L. Brown).
that, in the case of the popular Irish Sweepstakes, less than 20 per cent of the total monies received actually found its way into the hospitals. One of the founding fathers of Canadian socialism, J.S. Woodsworth pointed out that the lottery might be a voluntary tax, but it would also be a highly regressive one, with the tax burden falling on the shoulders of those least able to pay.(103)

There was also a technical, legal argument against the Bill put forward by the Secretary of State. In his view, it was *ultra vires* the federal Parliament to permit lotteries in the proposed manner. *Section 92(7)* of the *British North America Act* vested jurisdiction over hospitals in the provinces, and the minister could find no authority for the federal government to empower the attorney general of a province to create a sweepstakes committee to raise money for certain provincial purposes. Nothing less than an amendment to the *Criminal Code* would suffice.(104)

The opponents of the Bill succeeded in stalling its second reading, which effectively killed the proposal. Three subsequent attempts to get federal authorization for

103 *Ibid* at 3298 (J.S. Woodsworth).

104 *Ibid* at 3289 (Hon. C.H. Cahan). The private member’s bill which was introduced in the House of Commons concurrently with the Sweepstakes Bill and which proposed to amend the *Criminal Code* in a manner consistent with the Secretary of State’s legal opinion, did not receive second reading: *supra* fn. 96.
lotteries in the late 1930s also met with defeat. (105) The 
Criminal Code was successfully amended in 1938, however, to 
provide that a place is not a common gaming house "while 
occupied or used by an incorporated *bona fide* social club" 
nor if it is "occasionally" used by charitable or religious 
organizations, "if the proceeds are used for the benefit of 
any charitable or religious object". (106) In other words, 
gambling which took place as a means to an end such as 
charitable fund-raising or simple socializing, rather than 
as an end in itself, was to be permitted.

It was not until 1950 that the legalization of 
lotteries re-emerged as a political issue. Somewhat 
symbolically, the government of Quebec enacted legislation 
creating a provincial lottery to support education and 
health. (107) Without federal co-operation, it remained a 
dead letter.

105 1st Reading March 16, 1938; P.M. Mackenzie King killed 
another bill; March, 1939, V. Mallette introduced a private 
member's bill. These proposals are cited in Labrosse, supra 
fn. 7 at 121.

106 S.C. 1938, c.44, s.12. The stated aim of this provision 
was to rationalize the definition of a common gaming house 
with the exemption given to raffles for a charitable or 
religious object found in what was then s.236(6)(b) of the 
Code: Canada. House of Commons Debates (1938) Vol. IV, 
p.4316.

107 An Act to Promote the Diffusion of Education and the 
Protection of Health, S.Q. 1950, c.14. During the early 
1940s, several provinces had enacted legislation to deal 
with perceived problems within provincial boundaries 
relating to gambling, e.g. The Gaming and Betting Act of 
Ontario, S.O. 1942, c.19 and the Alberta Slot Machine Act, 
R.S.A., 1942, c.333, but it was struck down by the courts as
Revision and Reconsideration

Early in 1949, the government of the day authorized the examination and study of the Criminal Code of Canada by means of a Royal Commission whose mandate was to revise ambiguities, adopt uniform language, eliminate inconsistencies, re-arrange provisions and Parts, simplify and make the Code exhaustive. This was the first time, since 1892, that the whole body of Canada's criminal law was to be subject to systematic study. By that point, the gaming sections of the Code, like many of its other provisions, had been altered repeatedly in a piece-meal fashion to meet the exigencies of particular situations and had been subjected to varying interpretations by the judiciary. Rationalization was a desirable goal.

The Criminal Law Revision Commissioners issued their report in 1952, and legislation based on their recommendations was passed in 1954. Regarding the being ultra vires. See infra, Chapter Four for a more detailed discussion of these measures.


110 S.C. 1953-54, c.51. One of the most significant changes of this revision was the abolition of all common law offences, except contempt of court. Those common law offences which were thought to be worth preserving were specifically amalgamated into the Criminal Code.
gaming provisions of the Code, however, this exercise was without any immediate impact. The Commissioners chose not to deal with them, offering this explanation:

Your Commissioners have considered the gaming sections of the Code. While we are of the opinion that these sections contain certain inconsistencies and anomalies we have suggested no substantive changes because of the controversial nature of the matters involved.

Similarly, the Special Committee which was struck to consider the proposed revisions to the Criminal Code also chose to set aside the issue (referring to lotteries in particular), along with the defence of insanity and capital and corporal punishment, on the grounds that these questions were "of such paramount importance that they could and should not be dealt with merely as incidentals" to the revision of the Code. In the debates in the House of Commons itself, the omission of any revisions relating to gaming was uncontroversial as, by that time, the government was already proposing a special study of lotteries. In the early months of 1954 a Parliamentary Special Joint

111 Supra fn 109 at 16.


113 During the extremely brief remarks on the relevant gaming sections made in the course of parliamentary debate, it was observed that it was only the lottery provisions which were problematic. Other forms of gambling, such as "roulette and fan-tan" were dismissed as "undesirable in our civilization" - Canada. House of Commons Debates (1953-54) 1st Sess. 22d Parl. Vol. II p. 1030 (E.D. Fulton).
Committee was struck to examine the criminal law relating to capital punishment, corporal punishment and lotteries and to make recommendations regarding its amendment.

After hearing submissions from a wide range of interested parties - church groups, law enforcement officials, exhibition boards, trade unions, social agencies etc. - who put forward very similar arguments to those heard in the parliamentary debates on the Hospital Sweepstakes Bill in 1934, the Committee made several recommendations.

The first was a decision, rather than a recommendation, to classify bingo and similar games as being in the same category as lotteries. The Committee viewed bingo games as being within its terms of reference because they were not dissimilar to lotteries in operation and because they were usually arranged and played by organizations having similar purposes to those conducting lotteries for benevolent purposes. Indeed, it was recommended that the law be clarified "to insure that bingo and similar games be subjected to the same prohibitions and controls as apply to lotteries". (114)

Secondly, the Committee recognized that although there was widespread public support for lotteries and bingos operated for charitable and benevolent purposes, they were ,

114 Canada. Reports of the Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries (Ottawa: Queen's Printer, 1956) paras. 1, 30.
more often than not, being run in violation of the terms of the Criminal Code, e.g. the prizes were worth more than $50 and had not previously been offered for sale, conditions which were found to be "unrealistic". (115) Policing agencies found it difficult to enforce existing laws in the face of adverse public opinion. This caused two problems: contempt for the law and the absence of effective controls. Accordingly, the chief recommendation of the Special Joint Committee was that the law relating to lotteries should be relaxed in some respects, and tightened up in others. By making clear which kinds of lotteries would be legal and under what kinds of conditions, then, in theory at least, it would become easier to enforce the law against illegal schemes: (116)

The Committee therefore considers that the law should be amended with three purposes in view. First, the prohibitions against lotteries must be clearly stated; second, the inconsistencies in the present law must be eliminated; and third, the types of lotteries to be permitted must be clearly defined and subjected to effective supervision and control. The implementation of this policy will result in the effective prohibition and restriction of several types of lotteries now carried on in spite of their dubious legality. It will also result in some relaxation of existing prohibitions to permit adequate and workable control. It is precisely because the Committee has concluded that the present prohibitory laws do not protect the public that it is disposed to recommend some relaxation in line with the same reforms introduced with respect to the control, sale and consumption of alcoholic beverages. Prohibition proved unworkable and led to many serious abuses; but the present system of licensing and control, which is supported by the main body of public

115 Ibid at para. 37.

116 Ibid at para. 22.
opinion, has worked satisfactorily and on the whole appears to have contributed to efficient law enforcement. Accordingly, the Committee advocated a strict licensing and inspection system, administered by a competent provincial authority, for charitable and benevolent organizations who wished to conduct a lottery.

The final major recommendation put forward at this time was that there should be no state lotteries in Canada. It was not felt that they were an efficient way of raising public funds, and that they would serve no useful purpose. On the contrary, the Committee considered that it was the proper role of the state to control and regulate such gambling activity as was permitted to its citizens under the law. It was highly inappropriate for the state itself to provide facilities for gambling to the public and to actively promote it.(117)

In essence, the recommendations of the Committee regarding lotteries and bingo were relatively cautious and conservative. They envisaged a modest relaxation of one form of gambling which was in line with the scheme that had existed in Canada for almost a century. Quebec’s desire for a provincial, or even a national lottery for broad social purposes did not appear to be even a remote possibility.

117 Ibid at paras. 23-25.
The Committee's report on the criminal law relating to lotteries met with legislative silence. The gaming provisions, which had been untouched by the revision process, remained on the statute book, "warts and all", until 1969. The decade of the 1960s, a period of turbulence and transformation for many aspects of society, was to see a radical transformation of legal status of gambling in Canada. The process by which this change was achieved will be examined in the next chapter.
CHAPTER TWO
THE PROCESS OF DECRIMINALIZATION

Preliminary Manoeuvres

Although the recommendations of the Parliamentary Special Joint Committee to amend the Criminal Code in regard to lotteries for benevolent purposes had no immediate impact, it is clear that, in 1960, the federal government was considering legislative changes. In that year, at the annual meeting of the uniform law commissioners, the advisory body for co-ordinating law reform efforts across Canada, a draft revision of the lotteries provisions of the Code prepared in the Department of Justice was considered and commented upon. (1) In February 1961, then Minister of Justice, E.D. Fulton let it be known more widely that the government was seriously studying the issue of lotteries. (2)

Some federal politicians were unwilling to wait for the government to act, however. Starting in early 1961, there was a steady stream of private member’s bills relating to

1 Canada. Commissioners on Uniformity of Legislation. Proceedings of the 42nd Annual Meeting (1960), p.43. The Commissioners continued to study Canada’s gaming laws over the next few years. A committee was struck in 1965 to determine "whether there are areas of the lotteries problem in which the [Criminal Law] Section can be of assistance": Proceedings of the 47th Annual Meeting (1965) p. 44. The following year, the Section considered this Committee’s report and recommended against state lotteries and off-track betting: Proceedings of the 48th Annual Meeting (1966) p. 32.

lotteries which received first reading in the House of Commons. Private members bills, unless they are adopted or otherwise supported by the government, are rarely successful, but they do serve to keep an issue in the political arena.

The first bill, "for the establishment of a Sweepstakes Commission for the benefit of hospitals" was introduced in the House in February 1961. This bill proposed that the Sweepstakes Commission would use its initial capital grant to organize and conduct a sweepstakes scheme whose profits would be distributed on a pro rata basis according to the populations of the provinces. In other words, it would be a national scheme.

In 1962, there were two bills, one proposing a national lottery and one favouring lotteries at the provincial level "to provide financial assistance to hospitals or for other welfare purposes under provincial jurisdiction". Identical versions of this latter bill, all proposing an amendment to what was then s.179 of the Code to allow provincial governments to operate such lotteries, were

3 Bill C-36 An Act to provide for the Establishment of a Hospital Sweepstakes Board (1961).

4 Bill C-36 An Act to Provide for a Canadian Lottery (1962).

5 Bill C-56, An Act to amend the Criminal Code (Provincial Lotteries) (1962).
introduced repeatedly in the House between 1963 and 1967. (6) A slightly different version of this bill, which received first reading in June, 1967, would have exempted from s. 179 "a lottery organized and operated by a provincial government for the purpose of providing for the payment in the province of additional amounts with respect to family allowances and old age pensions." (7) The advent of socialized medicine had arguably rendered hospital sweepstakes somewhat of an anomaly.

Another proposed amendment to the Criminal Code, which received first reading in successive years from 1963-1967 was An Act to amend the Criminal Code (Raffles and Bingo for Charitable Purposes), (8) the aim of which appears to have been the implementation of some of the recommendations of the 1954 Special Joint Committee. It did, however, steer clear of the more contentious issue of true lotteries. Rather, it proposed to broaden the existing exemptions for charitable gaming and raffles at church bazaars to make it possible for service clubs and similar community service organizations as well as religious organizations to raise funds for charitable and religious objects without the threat of prosecution. The explanation accompanying the bill

6 Bill C-36 (1963); Bill C-44 (1963); Bill C-22 (1964); Bill C-65 (1965); Bill C-38 (1966) and Bill C-43 (1967).

7 Bill C-137, 2nd Sess. 27th Parl. (1967).

8 Bill C-73 (1963); Bill C-65 (1964); Bill C-15 (1965); Bill C-84 (1966) and Bill C-109 (1967).
stated that the existing exemptions were too narrow and that the law was unevenly applied across the country:(9)

In some parts of Canada [service clubs, community service and religious organizations] can carry on raffles and bingos not only on a regular basis if desired, but also on a scale sufficient to meet the financial needs for which they are held, without any interference by local law enforcement authorities who appear to pay no attention to the clear provisions of the Criminal Code ... At the same time other such groups ... are in effect not permitted to carry out this very same type of fund-raising activity by local law enforcement authorities who consider themselves obliged to enforce the provisions of the Criminal Code as they now stand in their entirety.

[This bill] is designed to eliminate this unfair situation and to ensure that all such groups are treated on a basis of equality that will permit them to hold raffles and bingos in a manner and on a scale sufficient for the charitable purposes intended.

In the federal legislation that was ultimately enacted in 1969, ideas from both of these series of private members' bills would be incorporated.

Another development which doubtless had great significance for the lottery debate, particularly in eastern Canada, was the advent of legalized lotteries in the north eastern region of the United States. In 1963 the state legislature in New Hampshire authorized a state lottery which was first operated the following year.(10) Although initial revenues fell short of official expectations, it started a trend which was to spread through virtually every state in the union in the following years. Even if Canadians

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9 Bill C-73, 1st Sess. 26th Parl. (1963), Explanatory Notes.
could not patronize a provincial or national lottery, access to the American market was often just a short drive away.

Particularly in Quebec there was growing pressure at provincial and municipal levels for the institution of lotteries. Montreal in particular, in the second half of the 1960s was confronted with huge bills for Expo '67 and was facing the prospect of even larger ones for the Olympic Games which were to be held there in 1976. Although by 1968, the federal government had begun to act on the issue of lotteries, the municipality of Montreal chose to take matters into its own hands and instituted a "voluntary tax": the general public could become voluntary taxpayers of the city by making monthly contributions of $2 and thereby become eligible to participate in a monthly draw for valuable prizes in the form of silver ingots. It was widely recognized that this was a barely disguised lottery and it was eventually struck down by the Supreme Court of Canada as being in contravention of the prohibition of lotteries in the Criminal Code. (11)

The entire issue of gambling had also been considered at length by a commission of inquiry into the administration

11 City of Montreal v. Attorney General of Quebec, [1970] S.C.R. 332. By the time this decision was issued, late in 1969, it had been overtaken by amendments to the Criminal Code permitting state lotteries.
of justice on criminal and penal matters in Quebec. (12) Polls conducted for the commission indicated widespread support for the idea of a state lottery and the commission cautioned of the evils which can result when law and public opinion are out of step. (13) It concluded that rather than prohibit it, the state should use gambling's "enormous resources" to finance "essential social reforms". Accordingly, the following recommendation was issued: (14)

[G]ambling must be socialized. By that we mean that the State authorizes gambling, but organizes it for its own benefit and without intermediaries. Consequently there is no issuing of permits or licences in favour of private enterprise. This appears to us to be the only realistic attitude.

Before this report was issued, the federal government introduced legislation which was fundamentally to alter the legal status of certain forms of gambling in Canada.

Government Proposals

Late in 1967, the Minister of Justice in the Liberal government of Prime Minister Lester Pearson, Pierre Trudeau introduced into the House of Commons an omnibus bill to amend several aspects of the Criminal Code. They included the decriminalization of, i.e. the removal of criminal


13 Ibid at 74-75.

14 Ibid at 87.
sanctions from, abortion, homosexual practices and lottery schemes, under certain circumstances. (15) Bill C-195 proposed inter alia to introduce section 179A which would allow state lotteries at the option of the federal or provincial governments, the broadening of charity gaming along the lines suggested by the Parliamentary Special Committee in 1954, the continuation of the existing exemption for gaming at agricultural fairs and exhibitions and the creation of a new exemption for gaming at public places of amusement under provincial licence. This draft legislation also made clear that the term "lottery scheme" as it was used in the Code was not to be restricted to true lotteries, but encompassed any "game", that is, any game of chance or mixed chance and skill.

Although this Bill was abandoned when Parliament was dissolved for the general election in 1968, it was reintroduced in a virtually identical form in December of that year, after the Liberals were re-elected under the leadership of Pierre Trudeau. In relation to lottery schemes, it represented a radical departure from the existing law: it decriminalized significant forms of gambling, but in a rather unique and indirect fashion.

Criminal laws generally conform to a pattern of a prohibition to be met with a sanction, with legally

recognized excuses and justifications taken into account. In its most straightforward form, decriminalization would result in the total withdrawal of the law from the targeted activity. This was the option chosen by the government for homosexual acts between consenting adults, consistent with its policy of keeping the state 'out of the bedrooms of the nation'. Regarding lotteries and related games, however, the prohibition and related sanctions were to remain in the Code, but they would not apply if those activities were authorized by the federal government in one instance, and provincial governments in the others.(16) The policy proposed here was what has been termed a "licensing model" of decriminalization because the activity was to be allowed under state permit.(17) The criminal law was to be replaced by other forms of legal controls.

The bill's sponsor, the Minister of Justice, John Turner described the proposed amendments concerning

16 There are only two remotely similar provisions: what is now s.83 of the Criminal Code, R.S.C. 1985, c.C-46, which exempts provincially authorized boxing matches from the prohibition of prize fights; and s.287 made legal abortions contingent upon the approval of provincially appointed and supervised therapeutic abortion committees. This provision was found to contravene the Canadian Charter of Rights and Freedoms, s.7 and to be of no force and effect in R. v. Morgentaler et al., (1988), 37 C.C.C.(3d) 449 (S.C.C.).

17 Skolnick and Dombrink, "The Legalization of Deviance", (1978) 16 Criminology 193 at 200. See infra Chapter Six for a more detailed discussion of the different models of decriminalization.
lotteries as incorporating "a fundamentally new approach":(18)

The amount and nature of gaming which will be permitted will depend to a considerable extent on the policy of provincial authorities in issuing ... licences ... The attitude towards lotteries in Canada varies in various parts of the country. The proposed amendment will provide to an appreciable degree, for recognition of that fact. The nature of the proposed amendments might be described as local option within prescribed limits set out in the Code.

Indeed, the official justification for the new provisions was premised almost exclusively on the notion of the lack of a national consensus regarding lottery schemes. Both in the House and in Committee hearings, the Minister denied that these changes resulted from provincial pressure, although the provinces were reported to be in favour of them:(19)

To the best of our knowledge ... we have received no formal submissions either for or against this particular provision from any provincial government ... We are assessing public opinion in this country. We feel that public opinion is not unanimous about it and that it might vary from region to region. We are, therefore, leaving it to the regions, as that public opinion may be interpreted by their provincial governments that their provincial Attorneys General have control over whether or not there should be lotteries permitted within provincial boundaries.

Strictly speaking, this may have been true - that none of the provincial governments had made a formal submission at that precise time requesting authorization of a state


19 e.g. Canada. Proceedings of House of Commons Standing Committee on Justice and Legal Affairs, 1st Sess. 28th Parl. (1968-69) p.331.
lottery. Nonetheless, as has been indicated, pressure had been building in Quebec for some time for the province to be given the power to conduct lotteries. The denial of provincial pressure to decriminalize lotteries was, therefore, inaccurate. The lobbying was, however, coming mainly from a single province and it was perhaps impolitic for the national government to acknowledge that the criminal law was being amended solely to accommodate the wishes of that region. A more universally applicable rationale was employed: the moral ambiguity of gambling.

The proposed section 179A was explicitly rationalized on moral grounds, on the basis that the necessary social consensus for prohibition was lacking. Varying public opinion on the issue was asserted in Parliament, but was not empirically demonstrated. Outside of Quebec, there had been virtually no public discussion of legalized gambling and its merits since the Parliamentary Special Joint Committee hearings fourteen years previously. The moral argument offered by the Justice Minister was not altogether a compelling one. Nonetheless, anchoring the lotteries amendment to the issue of public ambivalence was consistent with the underlying rationale for other provisions of the omnibus bill directed at vice or so-called victimless crimes.

While the liberalization of charitable gambling was uncontroversial, the amendments permitting state lotteries
were not without their detractors. The arguments which, to
that point had been successful in maintaining the legal
status quo were raised again, but to no avail. For example,
it was argued that such lotteries were an inefficient
mechanism for raising money for state purposes and that they
were, in effect, a highly regressive form of taxation.(20)
It was also pointed out that the Protestant Church was
opposed to the changes.(21) This opposition had no impact.
During the Committee stage of the legislative process only
two minor amendments to the lottery provisions were
considered and adopted: clarification that charitable gaming
and gaming at a public place of amusement did not include
dice games, three card monte, punch boards and coin tables;
and the removal of financial limits for lottery schemes at
agricultural fairs and exhibitions.(22)

The revised provisions passed into law with the rest of
the omnibus bill in May 1969(23) with remarkable ease when
the contentiousness of its subject matter - abortion,
homosexuality and gambling - is considered. This very
juxtaposition may, in part, account for the bill's success.

20 Canada. House of Commons Debates supra fn. 18 at 5378 (S.
Knowles).
21 Ibid at 7776.
22 Canada. Proceedings of the House of Commons Standing
Committee on Justice and Legal Affairs supra fn. 19 at 17-6.
had to be debated and considered in committee as a whole, so that the rejection of a part would compromise the entire bill. One Member of Parliament, commenting on the scope of the bill and its implications observed:(24)

I do say this, and perhaps it is very abrupt to say it, that I think it is a package to get through certain things we would not normally have got through unless it was in this package.

The strategy was successful. The enactment of s.179A, in the words of then Minister of Justice, "withdraws the application of the criminal law and makes [lottery schemes] a question of civil, public policy."(25) This assessment was to be confirmed in the strongest terms over the following fifteen years.

The Federal-Provincial Struggle over Lotteries

Not surprisingly, the government of Quebec was the first to take advantage of the permissive terms of s.179A of the Criminal Code. By the end of 1969, the National Assembly had enacted legislation establishing two Crown corporations: the Regie des loteries et courses du Quebec and the Societe d'exploitation des loteries et courses du Quebec.(26) The main function of the former is to supervise horse racing and

24 Canada. Proceedings of the Standing Committee etc., supra fn. 19 at 145 (E. Wolliams).

25 Canada. House of Commons Debates supra fn. 18 at 7780.

26 Loi sur les Loteries et Courses, S.Q. 1969, c.28.
the issuing of licences for charitable gaming. The Societe was set up to conduct provincial lotteries.

The other provinces were somewhat slower to get involved in lotteries, but, in keeping with earlier predictions that lotteries would spread inexorably once they had been introduced in one region of Canada, they proliferated rapidly across the country during the early 1970s. Since 1969, true lotteries have become firmly entrenched in Canadian culture, and a significant source of government revenues. Further, particularly in western Canada, the broad statutory definition of a "lottery scheme" has been used to accommodate the expansion of charity gaming

27 During debates on the lottery question in 1934, several politicians expressed doubt that lotteries could be confined within provincial boundaries: e.g. Canada. House of Commons Debates (1934) Vol. III, 3316-17.

28 Manitoba set up a lottery in April 1970.; Alberta, Saskatchewan, British Columbia and the Yukon joined with Manitoba in 1974 to conduct lotteries under the umbrella of the Western Canada Lottery Foundation; Ontario’s first lottery was held in 1975; and in 1976, Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island began issuing lottery tickets through the Atlantic Lottery Corporation.

29 Canadian culture has also become heavily dependent on lotteries for funding. See Canada Council, Lotteries and the arts: The Canadian Experience 1970-1980 (Ottawa: Canada Council, 1982).

30 For example, in 1983-84, lotteries generated a total income in excess of $126 million for members of the Western Canada Lottery Foundation: W.C.L.F., Annual Report 1983-84 (Winnipeg, 1984).
in the form of bingo and casino-style games of chance that do not involve dice e.g. blackjack and roulette. (31)

The terms of s.179(1)(a) also permitted the government of Canada "to conduct and manage a lottery scheme in accordance with regulations made by the Governor in Council". In 1969, when the lottery amendments were introduced, however, the Minister of Justice stated that the federal government had no intention of establishing a lottery scheme "at present". This particular provision was apparently included simply for reasons of "symmetry": (32)

It seemed logical to the government that if the criminal law were to be withdrawn from lotteries managed by private organizations, charitable and religious, or by agricultural fairs, an option should also lie with the provincial government itself or with an agent of a provincial government, and, since this was being done, that the criminal law should be totally withdrawn in its application to the federal government in this area as well.

By 1973, however, the government of Canada had had a change of heart. The Olympic Lottery Corporation of Canada received its charter from the federal government in that year and proceeded to conduct lotteries to raise funds for the Olympic Games in Montreal. One observer notes that the national government's intrusion into state lotteries was not welcome, though Quebec was supportive of this particular

31 For an analysis of casino gaming in Alberta, for example, see Campbell and Ponting, "The Evolution of Casino Gambling in Alberta", (1984) 10 Canadian Public Policy 142.

32 Canada. House of Commons Debates supra fn. 18 at 7780-7781 (J.N. Turner).
scheme since it would receive most of the funds thereby generated. (33) This was followed by the creation of a federal lottery corporation, Loto-Canada, in 1976.

The perceived inefficiencies of Loto-Canada were to become an election issue in 1979, with the federal opposition party promising to dismantle it and to vacate the lottery field in favour of the provinces if elected. The Progressive Conservative party was indeed elected, and the newly formed government took steps to enable it to make good on this undertaking. The federal minister responsible for lotteries signed an agreement with his provincial counterparts according to which, Loto-Canada would cease operations on December, 1979 and the provinces would pay $24 million annually to the federal government in compensation. (34) This arrangement was not finalized in the form of legislation, however. Accordingly, when the short-lived Conservative government lost the general election in February, 1980, Loto-Canada was resuscitated, and some of its reserve funds were used to research the potential for future federal involvement in lotteries, in particular in sports pools.


34 The text of this agreement is set out in Labrosse, supra fn. 33 at 179-181.
Legislation creating the Sports Pool Corporation was passed in 1983,(35) and it commenced operations the following year. It also became the subject of litigation between the federal government and the provinces.(36) Before the Federal Court had the opportunity to consider the merits of the argument of the provinces that the federal governments actions were in breach of the 1979 agreement, there was another general election and the Conservatives were returned to power with an overwhelming majority. Once again, negotiations were commenced between the two levels of government to settle the issue of control over true lotteries. This time, however, the resulting agreement was to be finalized by an amendment to the Criminal Code of Canada.

In June, 1985, the federal minister for sport and the provincial ministers responsible for lotteries signed an agreement that, in exchange for the federal government relinquishing any claim to conduct lotteries and reinforcing provincial control of lotteries and gaming, the provinces would make annual contributions to the federal Treasury as well as $100 million to the Calgary Winter Olympic Games and would bring a halt to their litigation against the federal government regarding lotteries. This agreement which was in


36 Attorneys General of all the Provinces of Canada v. The Queen in Right of Canada (Fed.Ct. T-622-84).
the form of a contract, complete with a consideration clause, was also contingent on consequential amendments to the Criminal Code being proclaimed no later than December 31, 1985. (37)

The legislation that was drafted proposed to repeal the provision of what was then s.190 of the Code, which permitted the government of Canada to conduct and manage lottery schemes, to make exemptions from the criminal prohibition of lottery schemes the exclusive domain of the provincial authorities. (38) In other words, the federal government was to be divested of any capacity to conduct lotteries. The provinces were to have sole jurisdiction.

The time frame in the June agreement did not permit leisurely consideration of the Criminal Code amendments. There was almost no public discussion of the measure which proposed a radical redistribution of government power. The lotteries bill was given first reading in October, 1985. As a result of an all-party agreement, a brief discussion in the Commons was substituted for a reference to the Standing Committee on Justice and Legal Affairs. This debate and the second and third readings of the bill took place in less

37 The full text of this agreement is set out in Canada. Senate Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs (1984-85) 1st Sess. 33rd Parl. Issue # 31, Appendix "Leg-31-C".

38 An Act to Amend the Criminal Code (Lotteries), Bill C-81, (1984-85).
than three hours on November 6, 1985.\(^{(39)}\) In the Senate, it was given first reading the following day, and second reading on November 27th. The Senate Standing Committee on Legal and Constitutional Affairs gave the proposals a closer examination, but, despite serious reservations, ultimately concluded that they should be "approved without amendment".\(^{(40)}\) The bill received Royal Assent on December 20th and was proclaimed in force on the final day of the year.\(^{(41)}\) Parliament effectively "rubber-stamped" an agreement negotiated by federal and provincial government officials.

In less than twenty years the legal status of lotteries and affiliated forms of gambling, i.e. "lottery schemes", had been fundamentally altered: instead of being largely prohibited under the criminal law, they were legalized under provincial authority. They had been transferred from one level of government to the other by legislation giving effect to a federal-provincial contract. Undoubtedly, both levels of government may enter into contracts and may sue and be sued on the basis of them. In this instance, however, they were not contracting the usual sense of the word, for


\(^{40}\) Canada Senate Proceedings of the Standing Committee on Legal and Constitutional Affairs, supra fn. 38, Issue # 35, p.15.

goods or services, but to re-apportion governmental power and to terminate litigation in return for substantial consideration, in accordance with strict time limits.

The Senate Standing Committee was concerned enough about this development to seek a legal opinion. Counsel offered the following assessment:(42)

In my opinion the subject matter of this agreement is clearly the exercise of powers of executive government. The contract is entered into by ministers who represent governments of which they are members. I would submit that the resulting agreement is not a private contract but a political arrangement ... if there is a breach of those political commitments, the proper forum for the resolution would not be the Court; the proper forum would be in the political chambers of government.

In other words, the "contract", being in reality a mere political commitment, was not legally binding and not justiciable, then or in the future. Nonetheless, the contractual format was eminently successful in securing provincial autonomy regarding lottery schemes. In practice, it was irrelevant that, de jure, the respective governments were not bound by the contract, because they and Parliament clearly felt bound de facto.

Law reform, in this instance, was essentially a bureaucratic or executive process rather than a legislative one. In large part, this results from the transformation of gaming legislation into a federal-provincial issue, and as

42 Canada Senate, Proceedings of the Standing Committee etc. supra fn. 38, Issue # 34, p. 12.
political scientists point out, federal-provincial relations in Canada are characterized by the dominance of the executive branches of both levels of government.(43) The federal-provincial negotiation process is one from which legislatures and non-governmental interests are virtually excluded.

As Fletcher and Wallace observe, it is de rigeur to view with alarm the tendency for federal-provincial agreements to be made with little or no reference to legislative bodies.(44) Where legislation is forthcoming (and many agreements can be implemented without it) governments are generally loathe to make changes in hard-won agreements in order to satisfy legislators. Any debate tends to be slight and inconsequential. They note further that members of the opposition parties are nearly always completely blocked out of the process. Much of the time, therefore, federal-provincial interaction is a "closed bureaucratic loop".(45) One eminent constitutional lawyer comments that, while it may be frustrating for legislators to find that their role is confined to ratifying arrangements made elsewhere, federal Parliament is too


dominated by Cabinet and the party system to be a suitable forum for federal-provincial adjustment. (46)

This pattern certainly holds true for the amendments made to Canadian gaming legislation in 1985. Federal-provincial negotiations occurred primarily between the federal Minister of State for Fitness and Amateur Sport and provincial ministers responsible for lotteries. Speaking before the Senate Standing Committee, the Minister of Sport justified the amendments to the Code as representing "good fiscal responsibility". (47) It was only in the final stages of this process that there was any consultation with the federal Minister of Justice and the provincial Attorneys-General on the amendments to the Criminal Code, which is noteworthy given the primary responsibility that these ministers have for criminal justice policy and law enforcement. As a result of their input, some minor amendments were made to the lotteries bill, but none were inconsistent with the substance of the proposals contained in the federal-provincial agreement signed in June, 1985. As indicated, within six months, the bill became law almost automatically.


47 Canada. Senate Proceedings of the standing Committee etc. supra fn. 38, Issue # 29, p. 15.
Both in terms of process and of defining the scope of the criminal law of Canada, the 1985 amendment creates a curious precedent. Were the federal and provincial governments to agree, a similar process could be used to amend other areas of the criminal law by allowing the provinces to license and regulate prohibited activities. Not only does this facilitate a decentralized criminal law and inter-provincial inconsistencies, but it also reduces governmental accountability. As one observer points out, a government cannot easily be held responsible for its actions if it can plausibly blame their consequences, or lack thereof, on another level of government that is either competitively or co-operatively involved in the same field of activity.\(^{(48)}\) Indeed, as will be shown in Chapter Five, this is exactly what has happened in relation to the issue of native gaming.

In any event, under the terms of Part VII of the current Criminal Code, the federal government continues to proscribe gambling, but only to the extent that it has not been authorized by the provinces. It is a mere residual role. True lotteries, bingo and other games of chance have become legitimate forms of public entertainment as well as sources of revenue for provincial treasuries and charitable and religious organizations.

\(^{48}\) Stevenson, "The Division of Powers" in Simeon (ed.) supra fn. 45. pp.71-123 at 114. See also Smiley, supra fn. 44 at 53.
In Britain, changes such as these would be unthinkable without there first being extensive investigation and discussion in the form of a royal commission. (49) In the United States, similar developments necessitated amendments to state constitutions, plebiscites and government studies. (50) In Canada the decriminalization of these forms of gambling has been a virtual "silent revolution". (51) Nonetheless, the impact has been profound. In subsequent chapters the implications for the division of powers under the Constitution will be discussed, as well as the consequential effects of the latter on Canada's native peoples. The new role for the provinces in regulating public gaming will also be addressed. First, however, the decriminalization of "lottery schemes" will be examined within the context of legal/philosophical and legal/sociological analyses of the appropriate ambit for criminal law.


51 This phrase is borrowed from Jacob's recent analysis of the transformation of divorce law in the United States: A Silent Revolution: Routine Policy Making and the Transformation of Divorce Law in the United States (Chicago: University of Chicago Press, 1988).
CHAPTER THREE
THE CONTRACTION OF THE CRIMINAL LAW

A Unique Enactment

Like most other common law countries, Canada has become a firm adherent to what could be termed a "there ought to be a law against it" mentality. The criminal law has been regularly invoked as the solution to a myriad of real and apparent social problems. In this policy process, the appropriateness of such a response has, by and large, been unquestioned. In recent years, however, the Law Reform Commission of Canada, instituted in 1970, has devoted considerable effort to promoting the principle of restraint in the use of the criminal law,(1) though with little success in terms of any real reduction in the scope of the Criminal Code and related statutes.

The Criminal Law Amendment Act(2), which was first introduced in 1967 and passed in May, 1969, thus predating the work of the Law Reform Commission, was at the time, and

1 The Commission's position on the use of the criminal law is as follows: "So criminal law must be an instrument of last resort. It must be used as little as possible. The message must not be diluted by overkill - too many laws and offences and charges and trials and prison sentences. Society's ultimate weapon must stay sheathed as long as possible. The watchword is restraint - restraint applying to the scope of criminal law, to the meaning of criminal guilt, to the use of the criminal trial and to the criminal sentence." Law Reform Commission of Canada, Report #3: Our Criminal Law (Ottawa: Information Canada. 1976) p. 27.

2 S.C. 1968-69, c.38.
remains, a rare occurrence: a genuine legislated contraction of the ambit of Canada’s criminal law. Lottery schemes, adult homosexual practices and abortion, were in varying degrees released from the taint of criminal prohibition. (3) The purpose of this chapter is to explore on a theoretical level why this change in relation to lotteries and other games of chance took place.

This amendment to the Criminal Code was part of a package of morally contentious reforms. Gambling, homosexuality and abortion are among a number of behaviours which are often described as "sins" or, in secular discourse, "vices". They are activities which are generally private, principally involving the a willing participant(s). As Skolnick observes, the term "vice" often suggests pleasure and popularity, as well as immorality. It has a dual character: it is conduct that can be simultaneously enjoyed and deplored, often by the same individuals. (4)

3 In the United States similar results were often achieved through the courts rather than through legislation e.g. the access to abortion resulting from the Supreme Court’s decision in Roe v. Wade, 410 U.S. 113 (1973). Since the entrenchment of the Canadian Charter of Rights and Freedoms, this avenue for legal change has also opened up in Canada e.g. in R. v. Morgentaler et al., (1988), 37 C.C.C.(3d) 449, the Supreme Court of Canada found that the restrictions which remained on abortions after the 1969 amendment were unconstitutional.

4 Skolnick, House of Cards (Toronto: Little, Brown, 1978) p.8; "The Social Transformation of Vice", (1988) 51 Law and Contemporary Problems 9. Abortion, however, while often described as a sin, is rarely termed a vice, and does not have the same connotation of pleasure as the other behaviours.
Vices are in essence morally ambiguous. Nonetheless, they have traditionally, although not consistently, been subject to criminal sanctions. During the 19th century, the repressive Victorian era, such behaviours were increasingly brought under the aegis of the criminal law. Once these laws were created, they obtained a certain immutability, regardless of whether or not they were enforced or indeed enforceable. One commentator notes that it is generally quite difficult to rescind such laws by express legislative act. Politicians tend to shy away from confronting these controversial and polarizing issues. Consequently, as Friedmann observes, it is often easier to achieve "tacit legal change" through an informal policy of non-enforcement of the law. As the previous chapters indicate, in the decades preceding the enactment of the omnibus bill in 1969, such a policy of non-enforcement of gambling prohibitions was adopted in many areas across Canada. Ultimately, however, Parliament did chose to enact liberalizing legislation relating to gambling, homosexual practices and abortion. It was to be the only enactment of its kind. Drug use, soliciting for the purposes of prostitution and obscene publications, which might also come within the definition of


vices or morally ambiguous behaviour, are still prohibited under Canadian criminal law.

The Legal Enforcement of Morality

The formal rationale offered by the government of the day for the lottery provisions of the Criminal Law Amendment Act centred on the notion of moral ambiguity: that, in Canada in the mid-1960s, a national consensus was lacking for the continued criminalization of these activities. Accordingly, permitting or prohibiting lottery schemes was to become a regional or provincial responsibility. The legal status of lotteries would reflect local values.

Implicit in this justification is the notion that society's values and the criminal law should be congruent; that the criminal law should reflect those values and not try to impose a common standard where none exists; and that there are situations in which resort to the criminal law as a method of social control is inappropriate.

This official reasoning is clearly reflective of a legal philosophy of considerable pedigree, resting as it does on the work of such notables as Jeremy Bentham and John Stuart Mill. One of the main tasks assumed by these

7 See Chapter Two, fn. 19 and surrounding text.

8 The work of Bentham and Mill and of their adherents and detractors has been examined minutely in numerous
Enlightenment philosophers was that of enunciating a rational theory for state action, particularly in the form of legislation. They sought to define an appropriate role for law in a just society. The foundations for their work were actually laid in the 13th century by St. Thomas Aquinas who prescribed the following relationship between law and vice:

Law is laid down for a great number of people of which the great majority have no high standard of morality, therefore it does not forbid all the vices from which upright men can keep away but only those grave ones which the average man can avoid and chiefly those which do harm to others and have to be stopped if human society is to be maintained, such as murder, theft and so forth.

In other words, law should be reserved for serious misconduct which is harmful to others.

The key determinant of "harm to others" was to become central to the work of John Stuart Mill, a utilitarian who owed much to his predecessor, Bentham. Jeremy Bentham constructed a theory of legislation for achieving the public good. He viewed every law as an evil because it infringed on individual liberty. It became a necessary evil only where the acts it sought to prevent "are really evils, and that these evils, are greater than those employed to prevent

commentaries. The discussion that follows does not purport to be anything but a brief review of their ideas, particularly as they might relate to legislative controls on gambling.

them."(10) This was the principle of utility. Further, legislators had to be satisfied that criminal sanctions would be an effective deterrent; that punishment would not produce a greater mischief than the criminal act and that there were no other means of preventing the wrongdoing.

In relation to this latter concern - the prevention of crime - Bentham had a unique perspective. He advocated the encouragement of "amusements" for two reasons: the pleasure of the pastimes themselves and their tendency to weaken "dangerous inclinations". In his list of suitable amusements he included the following:(11)

The invention of plays and pastimes, whether athletic or sedentary, among which games of cards hold a distinguished rank. Games of hazard should alone be excluded. These tranquil sports have brought the sexes together, have diminished ennui, that malady peculiar to the human race, especially to the opulent classes and to the old.

It should be noted that he did not exclude all games of chance from his list of suitable pastimes, only hazard. He clearly saw a positive role for moderate gaming which, in his view, should be encouraged rather than be prohibited by the criminal law.(12)


11 Ibid at 376-77.

12 Bentham noted that governments had not entirely neglected this branch of policy, but had pursued it to make the population passive and submissive to the government, rather than "to render the citizens more united among themselves, more happy, more industrious, more virtuous": ibid at 377. Interestingly, this view of legalized gambling as a pacifier
Regarding vices in general, Bentham was of the opinion that individuals were the best judges of their own interests. Where they could injure no-one but themselves, the law should leave them alone: (13)

If they deceive themselves, it is to be supposed that the moment they discover their error they will alter their conduct. The power of the law need interfere only to prevent them from injuring each other.

As one commentator on the Benthamite approach to determining the appropriate role for criminal law states, however objective it might appear to be on the surface, it does not reduce criminal legislation to a process of strict calculation. There is room for dispute regarding the actual consequences of conduct it is sought to prohibit, as well as in the designation of such consequences as harmful. (14) Nonetheless, Bentham drew attention to the continuing need to scrutinize existing criminal laws in a critical light and not to enact any new laws without similar deliberation.

Mill took a very similar utilitarian approach in determining the nature and limits of the power which can legitimately be exercised by society over the individual, focussing on harm to others: (15)

of the working classes is a contemporary criticism which is not infrequently voiced.

13 Ibid at 63.
[The simple] principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of the action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

As with Bentham's legislative formula, this would seem to exclude gambling unless it can be shown to harm individuals other than the players themselves. Mill acknowledged that although the gambler might only harm him/herself immediately, the 'ripple effect' of that harm might ultimately impact on others. Nonetheless, he maintained that such activities could only be dealt with by law when they lead a person to violate "a distinct and assignable obligation to any other person" which would take it out of the "self-regarding class". (16) He did, however, admit that the state could do indirectly what it should not do directly, i.e. the taxation or licensing of questionable goods and services in order to discourage conduct which it deems contrary to the best interests of the individual, as long as such a measure also had revenue-raising purposes: (17)

[I]t must be remembered that taxation for fiscal purposes is absolutely inevitable; that in most countries it is necessary that a considerable part of that taxation should be indirect; that the State, therefore, cannot help imposing penalties, which to some persons may be prohibitory, on the use of some articles of consumption. it is hence the duty of the

16 Ibid at 80-81.
17 Ibid at 102-103.
State to consider, in the imposition of taxes, what commodities the consumer can best spare; and a fortiori, to select in preference those which it deems the use, beyond a very moderate quantity, to be positively injurious. Taxation, therefore, .... up to the point which produces the largest amount of revenue .... is not only admissible, but to be approved of.

So-called 'sin taxes' have become an integral part of state financing. They pose a dilemma for the State, however, which Mill did not address: the tension between reining in the self-destructive impulses of its citizens and maximizing state revenues. As one contemporary observer argues, although the regulation of liquor and other vices derived their impetus from paternalistic motives, over time, control over revenue becomes more of an imperative. At best Mill ignored this dilemma; at worst, he assumed that the state would inevitably resolve it in the best interests of the individual.

The utilitarian legislative philosophy of Bentham and Mill did not meet with uncritical acceptance and wholehearted acceptance from either politicians or jurists. Its key critic in the 19th century was the influential scholar and would-be codifier of English criminal law, Sir James Stephen. His treatise, Liberty, Equality, Fraternity, which was first published in 1873 as a response to Mill's On Liberty, advocated that law had to replace religion in the realm of the enforcement of morality. Accordingly, it was necessary to use the criminal law to protect society; to

establish and maintain religions; to establish and maintain morality and to make alterations in existing forms of government or social institutions. (19) While he agreed with Mill and Bentham that sometimes the costs of using in the criminal law, in terms of public expense and the invasion of individual privacy, outweigh the possible benefits, he was of the opinion that this only held true in relation to "mere vices" such as ingratitude and "perfidy". (20) On the other hand, there were "acts of wickedness so gross and outrageous that self-protection apart they must be prevented at any costs to the offender and punished if they occur with exemplary severity". (21)

These sentiments mirrored Victorian attitudes towards the use of the criminal law to regulate private morality and no doubt permeated Stephen's work on a draft criminal code upon which the first Criminal Code of Canada was based. Consequently, Canadian criminal law has leaned towards what Friedmann has termed a fundamentalist approach to the function of criminal law, using it to defend and protect certain moral values and to punish vice, including gambling. (22)

20 Ibid at 151.
21 Ibid at 163. By "self-protection" Stephen means the protection of the members of society from harm.
22 Friedmann, supra fn.6 at 191.
Attention to the issue of the appropriate function of the criminal law was renewed in the late 1950s when the report of the Wolfenden Committee on Homosexual Offences and Prostitution in England was published.(23) The general principle underlying the Committee's specific proposals, which included the decriminalization of private, consensual homosexual acts, was that there is a realm of conduct which, irrespective of its morality or immorality, is "not the law's business" and by its very nature falls outside the legitimate scope of the criminal law.(24) It was this underlying rationale, rather than the Committee's specific proposals which proved to be the catalyst for the famous 'debate' between the English judge, Patrick Devlin and legal scholar, H.L.A. Hart.

Lord Devlin agreed that the Wolfenden Committee had posed an important question, i.e. what the function of the criminal law should be, but disagreed with its answer. In his view, the criminal law must uphold the "common morality" as determined through the medium of the legendary 'reasonable man'; immorality, for the purpose of the law, is what every "right minded person" is presumed to consider

24 Ibid at 24.
immoral. (25) Devlin could not accept the private/public morality dichotomy and concluded that "the suppression of vice is as much the law's business as the suppression of subversive activities". The cumulative effect of private immorality was detrimental to the public weal. (26)

Hart's response was firmly in the utilitarian mold, determining the scope of the criminal law by reference to the "harm to others" principle. Regarding the relationship between law and morality he stated: (27)

No doubt we would all agree that a consensus of moral opinion on certain matters is essential if society is to be worth living in. Laws against murder, theft and much else would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral. So much is obvious. But it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law.

Hart also criticized Devlin's notion of a "common morality" on the grounds that it obscures an important distinction between the morality which happens to be accepted and shared by a society ('positive' morality) and an ideal (or 'critical') morality. To enforce the former, Hart argued, ran the danger of entrenching society's


26 Ibid at 15.

prejudices under the banner of morality. (28) A similar distinction was made by Dworkin between moral convictions and "mere prejudices, personal aversions, arbitrary dogmas and rationalizations". The actual moral convictions of a community, providing they constitute a genuine "discriminatory morality", Dworkin suggested, might well be enforced by the criminal law; but the "morality" which consists in mere emotional aversion, no matter how widespread, is a morality only in a weak "anthropological sense" and is undeserving of legal enforcement. (29) Other commentators have also criticized Devlin's concept of "common morality" not on the basis of his misconception of what counts as a common morality, but on the basis that it ignores the value plurallism which exists in modern societies outside of a central core of shared values. For example, Wollheim wrote that, according to the philosophy of liberalism, the identity and continuity of a society rests not on the possession of a single "common morality" but on the mutual toleration of different moralities. (30)


As one observer notes, the liberal critique of Devlin's position on criminal law and morality became the orthodoxy of the 1960s. (31) In Canada, the banner was taken up by Morton in his brief but influential collection of lectures on the function of criminal law in 1962. (32) He asked, "Is the criminal law there to save the citizen from sin or to see that he gets home safely?" He opted for the latter. As for the existing state of Canadian criminal law, there were, in his estimation, a number of prohibitions in the Criminal Code in the "save them from sin" category which should be removed. (33) His conception of the criminal law was that it should play an educative or inculcative role within a very modest sphere of action: (34)

The thesis that one of the functions of criminal law is to act as a social conditioning device permits a sensible solution to the problem of the relationship between law and morality. In this thesis, the function of criminal law is not to enforce, but to create or help create a common morality. The purpose is not to reflect, but to create or reinforce the deep and ungovernable feelings like indignation, disgust and the sense of the abominable, by which the ordinary citizen is, in part, controlled. The necessity for society to create and perpetuate such a conditioning device exists, in my view, only in the areas of protection to which the Wolfenden Committee referred, i.e. bounds of common morality should encompass only the preservation of public order and decency, the protection of the citizen from injury, and the prevention of exploitation of the weak.

31 Lee, supra fn. 9 at 28.


33 Ibid at 5-7.

34 Ibid at 38.
Hence, the prevailing legal philosophy of the 1960s advocated and justified the actions taken by Parliament in the Criminal Law Amendment Act in 1969: gambling in the form of buying lottery tickets or playing other games of chance might be criticized as foolish and foolhardy, but it was not of a nature deserving universal criminal condemnation.\(^{35}\)

During this same time period, however, the over-reach of the criminal law was being criticized not only by legal philosophers but also by social scientists.

**Victimless Crime: the Limits of the Criminal Sanction**

After decades of focussing almost exclusively on criminal behaviour and theories of crime causation, sociologists and criminologists began to turn their attention to the role that criminal law itself plays in the criminalization process. The labelling perspective, which came to the fore in this era, emphasized that criminal behaviour is nothing more than what the law says it is.

Becker stressed this in his famous statement:\(^{36}\)

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35 On the topic of gambling's potential for harm, Geis notes that it is one of the less serious vices in regard to its direct harm to the individual: "It has no physical consequences except by indirection. It is not apt to be particularly time consuming. It may engender a philosophy rather unrealistic in terms of mundane existence, but it is arguable whether such a philosophy is more detrimental than enabling to an individual." *Not the Law's Business* (Rockville: N.I.M.H., 1972) p. 245.

Social groups create deviance by making those rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender". The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label. (Emphasis in the original)

Accordingly, many forms of criminal behaviour could be "cured" by changing the criminal law. The primary area in which the removal or repeal of the criminal law was advocated, was that of vice, e.g. sexual conduct, drug use, prostitution and gambling.

The term "victimless crime" was first coined by Schur, a lawyer and sociologist, in 1965 when he attempted an empirical study of the costs or consequences of using the criminal law to sanction private, consensual practices.(37) Perhaps the most obvious consequence is that such laws are criminogenic: they create crime and criminals and drive the provision of the forbidden goods and services underground onto the black market where they may be monopolized by 'organized crime'. These laws tend to be neither routinely enforced nor obeyed, which creates disrespect for the law as a whole. Because they are concerned almost exclusively with behaviour that takes place in private, when these laws are

enforced, objectionable law enforcement practices, including police corruption, are often used.\textsuperscript{(38)} There are also substantial human costs: the curtailment of individual freedom of choice and personal degradation. Schur concludes:\textsuperscript{(39)}

To marshal empirical evidence as has been done here is not to argue for an extreme utilitarianism in which it is assumed that some kind of quantitative calculation can produce authoritative answers to complex moral questions. In the absence of universal moral consensus, assessments of evidence and weighings of alternatives will necessarily entail reference to particular value hierarchies; the reasoning by which an analyst would support his judgement can, of course, be made known and in turn be assessed by others. Inevitably, a utilitarian or relativistic stance implies uncertainty. One who adopts such a stance denies himself as well as others the comfort of absolutes. Yet such uncertainty may not be inappropriate to a world in which presumably less-than-perfect policy decisions are made continuously ... If we cannot have certainty in our recourse to the criminal law, perhaps at least we would be wise to exercise restraint.

The solution he offers is "decriminalization", not so much because the targeted behaviours have been wrongly defined as social problems, but because they are social problems better dealt with by other mechanisms. In other words, decriminalization does not necessarily mean the complete absence of controls, just of criminal sanctions.

\textsuperscript{38} Packer notes that gambling offences share with narcotics laws the dubious distinction of having produced the major portion of the U.S. Supreme Court's decisions on illegal searches, wiretapping and other forms of electronic surveillance, and entrapment: The Limits of the Criminal Sanction (Stanford: Stanford U.P., 1968).

\textsuperscript{39} Schur and Bedau, \textit{supra} fn. 37 at 46-7.
Doing nothing is rarely a viable alternative. (40) Indeed, Schur notes that the means by which goods and services might be legally provided under a policy of decriminalization are important considerations which may influence the acceptance of specific policy proposals. Accordingly, medical or administrative regulation of vices is often proposed as a substitute method of social control. (41)

Schur's campaign of decriminalization, premised on the notion that laws proscribing victimless crime produce more social harm than good, has clear and direct links to liberal legal theory. He was joined in his task by several eminent social scientists, (42) perhaps none more influential than Herbert Packer. In his seminal work, *The Limits of the Criminal Sanction*, he addressed himself to what the criminal law might best, and most effectively, be used for, bearing in mind its enormous costs. To this end he constructed a

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40 Schur, *supra* fn. 37 at 178. The different models of decriminalization and their legal implications are discussed *infra* in Chapter 6.

41 *Ibid.* Thus, for example, the decriminalization of liquor consumption and gambling has generally relied on alternate policies of tight administrative controls. See, for example, the discussion of alcohol control by Levine: "The Birth of American Alcohol Control etc " (1985) *Contemporary Drug Problems* 63, and of gaming control by Skolnick: *House of Cards* *supra* fn. 4.

"bench mark" for the optimal use of the criminal sanction:(43)

The criteria for choice seem so clear that it may be trite to rehearse them. They include the following:

1. The conduct is prominent in most people's view of socially threatening behavior, and is not condoned by any significant segment of society.
2. Subjecting it to the criminal sanction is not inconsistent with the goals of punishment.
3. Suppressing it will not inhibit socially desirable conduct.
4. It may be dealt with through even-handed and nondiscriminatory enforcement.
5. Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
6. There are no reasonable alternatives to the criminal sanction for dealing with it.

Applying these criteria, he concluded that sexual practices, obscene publications, prostitution, drug use, abortion and gambling should not be subject to criminal sanctions. He felt that gambling in particular was an appropriate field in which to experiment with alternate social sanctions, because of its relatively low opprobrium relative to other vices.(44)

The work of Schur, Packer and others on the appropriate use of the criminal law is in many respects less abstract than the analyses of the legal philosophers, being based on empirical data and offering specific policy proposals. This development is taken a step further by Morris and Hawkins in

43 Packer, supra fn. 38 at 296.
44 Ibid at 353.
The Honest Politician's Guide to Crime Control. (45) As its title suggests, the thrust of this book is essentially pragmatic, though clearly informed by the theoretical debates of the 1960s. The financial costs of the existing over-reach of the criminal law are emphasized to a much greater extent that they were in the work of the other analysts, which probably reflects the fact that by the closing years of the decade, affluence was being replaced by rampant inflation and economic recession. In the decriminalization of gambling Morris and Hawkins saw an opportunity not only to reduce the scope of the criminal law and cut the costs of law enforcement, but also to generate revenues for the state: (46)

> We do not face a choice between abolishing or legalizing gambling; the choice is between leaving gambling and the vast profits which accrue from it in the hands of criminals or citizens taking it over and running it for the benefit of society or, by licensing and taxation measures, controlling it.

In other words, they argue that an increase in state revenues could be a beneficial effect of a streamlined criminal law. As will be discussed in the following section, however, others maintain that these fiscal benefits have been the primary cause in the decriminalization of gambling.


46 Ibid at 11.
Making and Unmaking Criminal Law

As the preceding pages indicate, the intellectual climate of the 1960s favoured the kind of changes that were enacted in the Criminal Law Amendment Act, 1969. It is tempting, therefore, simply to view this enactment as an example of enlightened law-making: prudent and tolerant policy-makers finally recognized the errors of past criminalization efforts and made the necessary adjustments. To some extent, this is probably true. It is, however, unlikely to be the sole, or even the most compelling reason for the government's action. If it was, it would make the absence of similar enactments relative to other vices problematic. There had to be other factors which influenced the legislative process. This final section of the chapter will attempt to isolate what those other factors might have been.

The North American experience with the criminal prohibition of alcohol consumption after the first world war has provided an ideal opportunity to study the factors which influence the making and unmaking of criminal law and the limits of the criminal sanction. One of the most enlightening analyses is Gusfield's Symbolic Crusade, which exposes the symbolic functions that law reform often serves. He portrays the enactment of the 18th Amendment to the constitution of the United States, which enacted Prohibition, as the high point of the struggle to assert the
public dominance of 19th century middle-class values. It represented "the victory of Protestant over Catholic, rural over urban, tradition over modernity, the middle class over both the upper and lower strata". On the relationship between law and status, he observes,

Since governmental actions symbolize the position of groups in the status structure, seemingly ceremonial or ritual acts of government are often of great importance to many social groups. Issues which seem foolish or impractical items are often important for what they symbolize about the style or culture which is being recognized or derogated. Being acts of deference or degradation, the individual finds in governmental action that his own perceptions of his status in the society are confirmed or rejected.

The fact that the Prohibition law was not and perhaps could not be enforced nullified its instrumental effects but not its symbolic import; the respectability of its supporters was honoured in the breach. Referring to gambling, Gusfield notes that institutionalized systems of evasion have often been maintained over very long periods of time without damaging the symbolic status and social validity of the legal norms.

Applying his observations to the Canadian context, it is possible to interpret the legal norms which prevailed before 1969 in relation to gambling, and particularly lotteries, as symbolizing the dominance of Anglo-Protestant

48 Ibid at 11.
49 Ibid at 126.
values. As the previous chapters clearly demonstrate, lotteries were heavily favoured in Catholic Quebec, but attempts within the province to evade federal prohibitions or to have the Criminal Code amended or new legislation enacted were singularly unsuccessful. Illicit gambling flourished. Nonetheless, the dominant legal values were those of English Canada. The repeal of the criminal prohibition of lottery schemes may be explained in part by the strengthening of Quebec’s power in Canada’s political scheme which took place in the 1960s - the ‘Quiet Revolution’. Quebec in the 1950s has been described as "a picture of social and political backwardness". (50) A decade later, Quebec lost its profound sense of inferiority: (51)

Everywhere there was a new self-confidence, a new sense of direction, a new sense that Quebec people were highly competent and qualified, capable of developing an advanced, modern technological society based on their own resources and their own abilities. This alone was a major revolution, from which much else was to flow.

Among these consequences was the emergence of Quebec as a force to be reckoned with in federal-provincial relations and a distinct enhancement in the social status of francophone culture. Increasingly, Quebec had the power to achieve changes which had eluded its grasp since before Confederation. (52) The decriminalization of lottery schemes


51 Fitzmaurice, Quebec and Canada (London: Hurst, 1985) p. 55.

52 For a more detailed discussion of this transformation see, for example, Morin, Quebec versus Ottawa (Toronto:
is arguably just one example of the effects of this newfound power.

Analyzing the repeal of the Prohibition law, Gusfield highlights the role that economic factors played in the process. The Depression strengthened the demand for increased employment and tax revenues which a re-opened beer and liquor industry would bring. (53) More recent research on the factors precipitating the legalization of gambling in the United States has also focused on the impetus of economic pressures. For example, in their study of legal controls on vice in Nevada, Galliher and Cross explain that the enactment of liberalizing legislation had little to do with morally enlightened law-making and a lot to do with economic considerations. (54) Indeed, in many areas of the United States, though not in Canada, legalized gambling was expressly rationalized on the grounds of its revenue-raising potential. (55) As one Australian commentator notes, modern -


53 Gusfield, supra fn. 47 at 127.


55 See, for example, The Twentieth Century Fund, Easy Money (New York: Twentieth Century Fund, 1974) and Dombrink, Outlaw Businessmen (Ph.D. Thesis) (University of California, Berkeley, 1981).
i.e. permissive - gambling legislation is being shaped by principles of economic utility:(56)

Gambling is increasingly being evaluated as to its external productive effects. It must now be seen to have a teleological purpose - either to generate welfare revenues, or to eradicate illegal gambling, or to revitalize a stagnant regional economy.

By the late 1960s, Canada, like most western nations, was experiencing the onset of fiscal crisis.(57) Significantly, the Criminal Law Amendment Act did not simply decriminalize lottery schemes and throw them open to private enterprise. Rather, they were to be run by or on behalf of the government, federal or provincial, with concomitant benefits to public coffers, or they were to provide additional or alternate sources of revenue for charitable or religious organizations. Perhaps the moral redefinition of these forms of gambling was as much a result of its perceived economic benefits as it was of philosophically enlightened lawmaking.

The explanation for the contraction of the role of criminal law in relation to lottery schemes is undoubtedly multi-dimensional. The foregoing discussion has attempted to


57 For a detailed discussion of this era see O’Connor, The Fiscal Crisis of the State (New York: St Martin’s Press, 1973).
explore at least some of its different aspects in order to provide a measure of understanding as to why this legal change took place. Having examined the how and why of the decriminalization of lottery schemes in Canada, the thesis now turns to an examination its legal consequences. A reduction in the scope of the criminal law, particularly in a federal system of government, can have a broader constitutional impact and, because it rarely entails 'doing nothing', often merely transfers responsibility for controlling the targeted behaviour onto another branch of the legal system. Accordingly, the remainder of the thesis will assess the impact this change has had, particularly in the areas of constitutional and administrative law.
CHAPTER FOUR
LOTTERY SCHEMES AND THE CONSTITUTION OF CANADA(1)

In a study of the law of gambling conducted for the United States government, it was astutely observed that reform "of the heart", that is, of gambling law, "may have .... consequences in the extremities", and that "seldom can any issue be worked out by the consideration of only one body of law."(2) The remaining chapters will be devoted to examining some of the more significant consequences of the decriminalization of lottery schemes in Canada, the first being its implications for the country's most fundamental legal rules, its constitutional law.

Jurisdiction over Gambling

Almost from the outset of Confederation, with its allocation of powers between the federal and provincial levels of government, the power to legislate in relation to gambling has been a contentious issue. As was discussed in the first chapter, two years after the passage of the British North America Act (now the Constitution Act, 1867), the province of Quebec enacted An Act to Amend the Laws

1 Some of the ideas in this chapter were first developed in an article written by the author and a co-author: Osborne and Campbell, "Recent Amendments to Canadian Lottery and Gaming Laws etc.", (1988) 26 Osgoode Hall Law Journal 19.

Respecting Bazaars and Lotteries. This statute was permissive in nature, effectively repealing prohibitory colonial enactments within the province, and it continued to be enforced despite subsequent federal legislation of a contrary tenor. From 1869 to 1892, the Quebec government ignored the federal prohibition of lotteries, relying on the province's more liberal provisions.

Shortly before the Criminal Code was enacted in 1892, however, the validity of the Quebec statute was challenged in the courts, albeit at a rather low level. In R. v. Harper, the Act Respecting Lotteries and Bazaars was held to be ultra vires the province. The defendants had argued that lotteries, being misdemeanours under the common law, did not fall within the criminal law power given to the federal government in s.91(27) of the British North America Act, 1867 (now the Constitution Act, 1867). The magistrate left this issue open, deciding that the federal government had enacted anti-lottery legislation under "the power which is expressly given to it to pass laws to maintain peace and good order in Canada, which, besides, is inherent to its

3 S.Q. 1869, c.36. It provided that, "Notwithstanding every provision to the contrary" lotteries and bazaars may be held where their object is to assist religious, charitable or educational establishments; "provided the things offered or to be disposed of by lottery do not consist of sums of money, notes, bank-notes, bonds, debentures or other negotiable securities of like nature."

4 e.g. The Lotteries Amendment Act, S.C. 1883, c.36.

5 (1892) 15 The Legal News 179 (Quebec Magistrates Court).
constitution and its sovereign power." (6) The Quebec legislation was a dead letter and, shortly thereafter, Parliament enacted the Criminal Code, including in it the prohibition of lotteries and other forms of gaming.

This initial jurisdictional tussle over lotteries and bazaars illustrates the reality of federalism in Canada. The division of powers between a central and regional governments is generally regarded as an essential feature of a federal constitution. (7) One observer notes that Canadian federalism, throughout most of its history, has been characterized by conflict and controversy regarding the division of powers. Federal and provincial governments have sought to expand their sphere of legislative power at one another's expense, and have not infrequently accused each other of poaching on the power guaranteed them by the constitution. (8)

The issue of jurisdiction over gaming re-emerged fifty years later after a number of provinces enacted supplementary measures to curb gambling in the face of what were perceived to be inadequate federal controls. For

6 Ibid at 185.


example, in 1942, the Legislature of Ontario passed the **Gaming and Betting Act**, (9) which provided that a court may, on application, order the closing for a period of up to a year, of premises in respect of which there had been a conviction under the disorderly house, betting and bookmaking provisions of the **Criminal Code**, within the previous three months. Where a closing order was made and the premises were thereafter used in violation of the order, the registered owner and any person found therein at the time were deemed to have violated the order and were guilty of an offence. In enacting this legislation, the province relied on its jurisdiction over property rights in the province. In **R. v. Lamontagne**, (10) however, the Ontario Court of Appeal found the **Gaming and Betting Act** to be invalid, being an encroachment on the federal criminal law power. The activity which violated the closing order and exposed the accused to punishment, e.g. keeping a common gaming house, was already an offence under the **Code**. Accordingly, the Court characterized the **Act** as a statute which operated essentially as criminal law in a field already covered by the **Criminal Code**. (11)

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9 S.O. 1942, c.19.


The Supreme Court of Canada was first confronted with the issue of the power to legislate in relation to gambling in 1954 in Johnson v. Attorney General for Alberta. The provincial statute being challenged in this instance was the Slot Machine Act of Alberta, which provided that slot machines were incapable of ownership within that province and could therefore be confiscated on application to the courts. The province maintained that this was a valid exercise of its powers over property and civil rights and matters of a local and private nature contained in ss.92(13) and 92(16) of the B.N.A.AAct. This contention was rejected by the majority. Mr. Justice Rand stated that the Criminal Code dealt comprehensively with the subject matter of the provincial statute, which was patently that of gambling. Deploring this attempt to displace the Code, he concluded that any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.


13 R.S.A. 1942, c.333. Several of the other provinces had also enacted legislation directed towards slot machines in the 1920s and 1930s. They had mixed success at surviving constitutional challenges at the level of the provincial appellate court: in R. v. Karminos, [1936] 2 D.L.R. 353, the Saskatchewan Court of Appeal struck down that province's slot machine statute; in R. v. Lane, [1937] 1 D.L.R. 212, however, the Supreme Court of New Brunswick found similar slot machine legislation to be within the legislative competence of the province.

14 Supra fn. 12 at 138.
opinion expressed by Mr. Justice Locke was even more emphatic:(15)

The determination of this matter does not, in my opinion, depend alone upon the fact that if the provincial legislation was lawfully enacted there would be a direct clash with the terms of the Criminal Code; rather it is my opinion that the main reason is that the exclusive jurisdiction to legislate in relation to gaming lies with Parliament under head (27) of s.91.

The most recent attempt by a province to enter the field of gaming was the "voluntary tax" scheme instituted by the city of Montreal in 1968, which was briefly discussed in Chapter Two. The city council approved a fund-raising scheme whereby the general public could become voluntary taxpayers of the city by making monthly contributions of $2, thus becoming eligible to participate in a monthly draw for valuable prizes in the form of silver ingots. It was widely recognized that this was a barely disguised lottery and, in a brief judgement, the Supreme Court of Canada officially characterized it as such, striking it down as being in contravention of the prohibition of lotteries in the Criminal Code.(16)

From 1982 to 1969, therefore, the courts were quite clear on the jurisdictional issue: legislation relating to

15 Ibid at 155.

16 City of Montreal v. Attorney General for Quebec, [1970] S.C.R. 332. By the time this decision was issued, late in 1969, it had already been overtaken by the amendments to the Criminal Code permitting state-operated and state-licensed lottery schemes.
gaming and lotteries was within the exclusive jurisdiction of Parliament. Were it not for the express terms of the Criminal Code initially enacted in 1969 and broadened in 1985, it is certain that provincial legislatures would have had no jurisdiction to permit the operation of lottery schemes. With the proclamation of those amendments to the Code, the jurisdictional issue was recast in terms of whether the federal criminal law power can, in the words of one of the few constitutional scholars to analyze the issue, "sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority." (17)

It has already been noted that the model of decriminalization adopted for lottery schemes by Parliament in 1969 was not one of total withdrawal of the law from the activity. Rather, lotteries and other games of chance would be permitted only where they were conducted by the federal government or conducted or authorized by a provincial government. Specifically, what was then s.179A of the Code provided that it was lawful

"(a) for the Government of Canada to conduct and manage a lottery scheme in accordance with regulations made by the Governor in Council ... 
(b) for the government of a province ... to conduct and manage a lottery scheme ... in accordance with any law enacted by the legislature of that province ... 
(c) for a charitable or religious organization, under the authority of a licence issued by the Lieutenant-

Governor in Council ... to conduct and manage a lottery scheme in that province ...
(d) for an agricultural fair or exhibition ... under the authority of a licence issued by the Lieutenant-Governor in Council ... to conduct and manage a lottery scheme in that province ... and 
(e) for any person, under the authority of a licence issued by the Lieutenant-Governor in Council ... to conduct and manage a lottery scheme at a public place of amusement in that province ...

Whereas Abel states that the federal authority in relation to criminal law comprises not only the creation of new crimes, but also the legalization of conduct which was criminal at Confederation or which was subsequently proscribed as criminal,(18) the simplicity of his position seems best suited to situations where there is a total withdrawal of the law. Hogg, on the other hand, points out that the courts have consistently struck down regulatory schemes set up within the confines of the criminal law.(19) In large part, the cases to which he refers concerned the establishment of federally constituted regulatory agencies which had broad discretionary powers in an indirect attempt by the federal government to do what it could not do directly.(20) Section 179A of the Code can be distinguished from these examples on the basis that they enable the

18 Abel, supra fn. 11 at 825.
19 Hogg, supra fn. 17 at 416-7.
20 e.g. Attorney General of Ontario v. Reciprocal Insurers [1924] A.C. 328 (P.C.) which struck down a section of the Criminal Code making it an offence to carry on the business of insurance without a licence from the federal Minister of Finance on the grounds that it encroached on provincial jurisdiction to regulate industry within a province.
exercise of provincial jurisdiction rather than encroach upon it. (21)

Nonetheless, Hogg also examines several provisions of the Code, including the lottery scheme enabling section, in which certain conduct is prohibited, but a power of dispensation is granted to an administrative authority and concludes that they too are open to criticism. (22) Two of the examples he cites are s.83 of the Code, (23) which exempts from the prohibition of prize fighting "any boxing contest held with the permission or under the authority of an athletic board or commission or similar body established by or under the authority of the legislature of a province for the control of sport within a province". Section.287, which has recently been invalidated by the Supreme Court of Canada, (24) exempted from the prohibition of abortions, those approved by a provincially regulated therapeutic abortion committee.

The constitutionality of this latter provision in terms of the division of powers was challenged in one of a number

21 It should be noted that the provision which allowed federal regulation of lotteries in the form of a state-conducted scheme was repealed in 1985. This amendment will be discussed in greater detail infra.

22 Hogg, supra fn.17 at 417.


24 In R. v. Morgentaler et al., (1988) 37 C>C.C. (3d) 449, the section was found to contravene s.7 of the Canadian Charter of Rights and Freedoms.
of cases involving Dr. Henry Morgentaler. (25) In this instance, the challenge was dismissed. The Chief Justice alone addressed himself to the issue of whether the federal government could decriminalize conduct by transferring regulation of it to a provincial body. Laskin adopted the approach taken by Abel and stated that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation." (26) In Hogg's view, this interpretation seems too broad since it would permit the kind of regulatory-scheme-in-the-guise-of-criminal-law which has been consistently nullified in the past. Regarding the lottery scheme provision, he expresses no opinion as to its validity beyond this general caveat. (27) Instead, he posits, but does not apply, a test of "colourability": (28)

> [T]he more elaborate the regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal.

The reality of the situation in relation to lotteries and other games of chance is that the provinces are generally happy with the arrangement and have no interest, at present, in challenging it. One could conclude that, in

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26 Ibid at pp. 626-27.
27 Hogg, supra fn. 17 at 417.
28 Ibid.
this instance, the end is seen as justifying the jurisdictionally dubious means by which it was achieved.

The Interdelegation of Power

Apart from the division of powers issue, there is also a question to be addressed regarding whether or not the federal government has the power to act in the particular way that it did, i.e. by transferring the control over lottery schemes to the provinces. In examining this issue, one must bear in mind not only the 1969 amendment, but also the further amendment of 1985, the result of which was to divest the federal government of all authority to operate lottery schemes. In other words, the power to conduct and authorize lotteries and other games of chance became the exclusive domain of the provinces.

To an increasing extent, legislative bodies are unable to enact all necessary legislation for effective government. They are, as the Law Reform Commission of Canada has pointed out,(29) unable to deal with all the pertinent issues in adequate detail thus necessitating intermediate measures between enacting statutes and individualized decision-making. Consequently, the pattern which has evolved is for

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Parliament or a provincial legislature to legislate a skeletal statutory scheme and then delegate to a subordinate body the power to enact the details. (30) This legislative strategy permits greater flexibility in applying broad provisions to changing circumstances, a faster administrative response, innovation and experimentation. (31)

In s.207 of the Criminal Code, Parliament has outlined general exemptions from the prohibition of lotteries and games of chance, leaving the authorization, licensing and control of the exceptions to the provinces. (32) The latter, however, are not subordinate to the federal authority. Rather, they are co-ordinate or equal in status. (33)

Unlike the Australian constitution, there is in the Canadian constitution no express power of interdelegation between federal and provincial authorities. One view is that there is in fact a constitutional prohibition against it: the inclusion of the term "exclusively" in s.91 of the Constitution Act, 1867, which describes the powers of the federal government, precludes the authorization of a

30 This was judicially approved in Hodge v. The Queen (1883) 8 A.C. 117 (P.C.).


32 The details of the administrative mechanisms which have been set up by the provinces in utilizing their powers under s.207 will be examined in greater detail in Chapter 6 infra.

33 Hogg, supra fn. 17 at 80.
delegation of legislative power to any instrumentality, including a provincial legislature.\(^{(34)}\) The courts, though, have been somewhat more ambivalent, moving from an absolute rejection of the interdelegation of legislative power to the creation of exceptions.

In *C.P.R. v. Notre Dame de Bonsecours*, for example, Lord Watson endorsed the following statement:\(^{(35)}\)

> The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.

A Royal Commission on Dominion-Provincial Relations reporting in 1940 supported the idea of delegation,\(^{(36)}\) but, a decade later, the Supreme Court rejected an interdelegation of powers between Parliament and a provincial legislature as unconstitutional.\(^{(37)}\) The so-called Nova Scotia Interdelegation case, in Hogg's opinion, was a landmark in the evolution of the understanding of the relationship between the federal and provincial governments.


\(^{35}\) [1899] A.C. 367 (P.C.) at 373. This was a remark made in argument. Although not technically binding, it has been highly persuasive in subsequent cases.


was based on the view that such interdelegation would disturb the scheme of the distribution of powers in the Constitution Act, 1867. Parliament and the Legislatures should not be permitted to agree to alter that pattern in the absence of explicit constitutional authority. There being none, the Court would allow none to be implied. (38)

Nonetheless, it soon became clear that this decision was to have a restricted application. The Nova Scotia statute at issue concerned the delegation of powers between legislative bodies. It would have authorized the provincial government to delegate to Parliament the power to legislate with respect to employment in areas under provincial jurisdiction. Reciprocally, the Nova Scotia Legislature was to receive from Parliament the power to make laws in relation to employment in industries under federal jurisdiction. (39) What was struck down was an interdelegation of legislative power. Within a year of this decision being handed down, the Supreme Court made it clear that this was the precise extent of its application. In P.E.I. Marketing Board v. H.B. Willis Inc., (40) the Court upheld a delegation of power between Parliament and a provincially appointed board. Mr Justice Kerwin stated, (41)

38 Hogg, supra fn. 17 at 296.


41 Ibid at 405.
Having been validly established by the Legislature, [the provincial board] has the capacity to receive and accept the authority authorized by Parliament to be conferred upon it by the Governor-General in Council.

The Court rationalized that, rather than choosing its own executive officers for carrying out its legislation, the federal government had simply chose a provincial body instead. The role of that board was characterized as being primarily administrative rather than legislative.

Accordingly, the question to be answered becomes one of whether or not the arrangement in s.207 of the Criminal Code involves a proscribed delegation of legislative powers. The terms of s.207(1)(a) explicitly require the enactment of provincial legislation as a prerequisite for state-conducted lotteries and would appear to come within the rule enunciated in the Nova Scotia Interdelegation case:

207.(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful
(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province; (emphasis added).

The power delegated to the Lieutenant Governor in Council in s.207(1)(b)-(d) to licence various bodies to conduct and manage lottery schemes, may, according to the wording of s.207(2), also involve legislative action on the part of the provincial legislature. This subsection provides that a licence may contain such terms and conditions as the Lieutenant Governor, or a person or authority designated by
him/her, "or any law enacted by the legislature of that province may prescribe".

Even if the reference to provincial legislation in s.207(2) were to be ignored, to come within the rule laid down in P.E.I. Marketing Board, the Lieutenant Governor must be characterized as a provincial board or agency. The closest the Supreme Court of Canada has come to the issue is in the Anti-Inflation Reference,(42) where Chief Justice Laskin acknowledged that there was a question whether Parliament had the power to delegate legislative authority to the Lieutenant Governor in Council, made passing reference to the British Columbia Supreme Court decision in Ex parte Kleinys,(43) but concluded that it was not an issue which had to be decided in that particular case. The B.C. judgement had upheld the delegation by Parliament to the Lieutenant Governor of a province of powers over the custody of insane persons, found in the Criminal Code. On a close reading of this case, however, it is clear that the judge attached a great deal of significance to the fact that the Lieutenant Governor had an inherent prerogative power over the custody of insane persons by virtue of the B.C. Constitution Act, s.65 of the B.N.A. Act and the Terms of

Union, (1872). In other words, s/he did not actually derive that power from the provisions of the Criminal Code:(44)

The Crown as parens patriae is entitled, by its inherent prerogative, to the custody of all insane persons, for the purpose of protecting the community.

It is extremely doubtful that a prerogative power to licence lottery schemes could be similarly maintained. Consequently, Ex parte Kleinys has questionable application in the context of s.207 of the Code.

The actual delegation of power in s.207 has been considered by the courts in only one instance to date, and it was decided without reference to the role of the Lieutenant Governor. In R. v. Furtney et al.,(45) the Crown appealed the respondents' acquittals on charges of counselling the conduct of bingo operations in a manner not authorized pursuant to s.207, i.e. in violation of the terms and conditions issued by the Ontario Ministry of Consumer and Corporate Relations. At trial, the provincial court judge had acquitted them on the basis, inter alia, that Parliament in s.207 had improperly delegated its criminal law power to the provinces. On appeal, Mr. Justice Campbell of the Supreme Court of Ontario reversed this finding based on the argument that the scheme provided in s.207 is analogous to that set up under the federal Fisheries Act,

44 Ibid at 105, per Ruttan J., quoting from R. v. Martin (1854), 2 N.S.R. 322.

45 Unreported decision, Supreme Court of Ontario, 13/9/88. This decision is not being appealed.
which had been recently upheld by the provincial Court of Appeal in *Re Peralta et al.*, and the Queen in right of *Ontario et al.* (46) In Mr. Justice Campbell's understanding, [it] upheld the delegation in the federal Fisheries Regulations of power to a provincial minister to issue fishing licences and to impose terms and conditions. The court held that the effect of the federal regulations was to set general policy and in setting individual fishing quotas within those policy guidelines the provincial minister was acting in a manner consistent with the regulations.

This is a misreading of *Re Peralta* and other decisions dealing with the nature of the federal *Fisheries Act* and the regulations made thereunder. *Re Peralta* actually confirmed that the fishing quotas were inserted by the provincial Minister pursuant to federal legislation, not provincial enactments. (47) A brief examination of the legislative scheme set up under the *Fisheries Act* comparative to the *Criminal Code* arrangement is useful at this juncture.

The regulation of fisheries is clearly a matter of federal competence under s.91(12) of the *Constitution Act, 1867*, which gives Parliament exclusive jurisdiction to legislate regarding "Sea Coast and Inland Fisheries". Accordingly, the *Fisheries Act* was enacted. The power to do so was confirmed by the Privy Council in *Fisheries Reference*, (48) but it was pointed out that the s.91(12) head

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47 *Ibid* at 716, per MacKinnon A.C.J.O.
of power did not confer proprietary rights over the fisheries. Thus, where fishing rights are owned by the province, the province may legislate in relation to fisheries under the provincial power to manage and sell public lands.\(^{(49)}\) As one observer notes, this overlapping of authority has been resolved in practice by the delegation of administrative - as opposed to legislative - powers from the federal to the provincial governments. Parliament enacts legislation which includes a delegation to the Governor in Council (not the Lieutenant Governor in Council) to make regulations for carrying out the purposes and provisions of the Act,\(^{(50)}\) and then, in conjunction with each province, enacts regulations which are administered by the officers of a provincial ministry.\(^{(51)}\) Thus, the **Ontario Fishery Regulations**, for example, are actually federal regulations administered by a provincial body. They are provincial regulations in name only, but federal enactments in law,\(^{(52)}\) and cannot be assailed as being ultra vires the provinces.

The constitutionality of this arrangement was upheld in **Re Shoal Lake Band**,\(^{(53)}\) which was cited approvingly in **Re**

\(^{(49)}\) **Constitution Act, 1867, s.92(5).**

\(^{(50)}\) **Fisheries Act, R.S.C. 1985, c.F-14, s.43.**


\(^{(52)}\) **Consolidated Regulations of Canada, 1978, c.849.**

\(^{(53)}\) (1978) 25 O.R.(2d) 334(Ont.H.Ct.) Cory J. held that the federal **Fisheries Act** adopted the machinery provided by the
Peralta and also in a more recent decision of the Ontario Court of Appeal, R. v. Agawa,(54) in which it was stated,

the learned summary conviction appeal court judge treated the Ontario Fishery Regulations as if they were provincial laws subject to Indian treaty rights because they are administered by provincial officials. The delegation of administrative authority over the Ontario Fishery Regulations is a proper exercise of Parliament’s legislative authority and does not alter their status as federal laws.

As will be shown in Chapter Six, the regulatory instruments enacted pursuant to s.207 of the Criminal Code are not in the same mode. They are provincial provisions issued by provincial officials. Accordingly, the analogy drawn between the legislative schemes in the Fisheries Act and s.207 of the Code in Furtney et al., is not a valid one and the constitutionality of the latter remains suspect.(55)

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provincial Game and Fish Act by means of the regulations and that this was a valid adoption of administrative authority.

54 [1988] 3 C.N.L.R. 73.

55 It is interesting to note that when the original Criminal Law Amendment Bill was considered by the Criminal Law Section of the Commission on Uniformity of Legislation in 1968, concerns were expressed in some quarters as to the advisability of provincial as opposed to federal licensing for lottery schemes. Accordingly, it was suggested that consideration should be given to licensing based on federal regulations, but administered by the provinces, i.e. a scheme similar to that found in the Fisheries Act: Canada. Commissioners on Uniformity of Legislation, Proceedings of the 50th Annual Meeting (1968) p. 36.
Referential and Conditional Legislation

The scope of the prohibition of federal-provincial interdelegation in the Nova Scotia Interdelegation case has also been restricted by the characterization of instances of legislative co-operation between the two levels of government as referential or conditional legislation when, in reality, they represent a true delegation of powers. In other words, the ambit of these valid techniques of legislative co-operation has been broadened with a corresponding narrowing of the invalid technique.

As defined by Russell, referential legislation incorporates the valid enactments of another legislative body; conditional legislation makes the carrying out of the policy stated in a statute conditional upon the act of another government agency. (56) His usage is not uniform, however. As a result, the distinction between the two is not always clear cut. For example, Abel categorizes criminal prohibitions which also contain exemptions from their operation as "conditional"; (57) Driedger, however, defines the lottery scheme exemption provision as "legislation by reference". (58) As s.207 of the Criminal Code has been

56 Russell, supra fn. 39 at 471.
57 Abel supra fn. 11 at 825. He does not distinguish between prohibitions which are conditional on federal action and those contingent on provincial processes.
58 Driedger supra fn. 34 at 704-5.
typified as permissible referential or conditional legislation, it will be more fully explored in that context.

The key cases in this area concern the federal Lord's Day Act. In 1903, the Judicial Committee of the Privy Council struck the Lord's Day Act of Ontario as an encroachment on the federal criminal law power. Hogg notes that, prior to this decision, it had been widely assumed that Sunday observance was within provincial competence as a matter of property and civil rights within the province, or as a matter of a merely local or private nature in the province. The federal legislation which was enacted shortly thereafter prohibited a number of activities on Sundays, but the principal sections created exemptions. For example, s.8 made it a punishable offence to run or conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force". The province of Manitoba enacted legislation to limit the application of the federal prohibitions in that province so that it would be lawful to run or conduct excursions to resorts within the province.

60 Hogg supra fn. 17 at 305.
62 R.S.M. 1913, c.119, s.1.
The validity of this legislation was challenged in Lord's Day Alliance of Canada v. Attorney General for Manitoba, with the plaintiffs maintaining that it constituted an interdelegation of powers. The Privy Council deemed it relevant to ask "whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all" in order to determine if this was a statute "in force" within the meaning of the federal exemption, and thus be legislation by reference. This meant it had to be classified as legislation other than criminal law, which seemed unlikely in light of the Privy Council's decision in Hamilton Street Railway. Nonetheless, the Privy Council managed to find that the Manitoba statute was valid provincial legislation, although the rationale is far from convincing or comprehensible:

Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province".

Speaking for the unanimous Court, Lord Blanesburgh continued:

64 Ibid at 392, per Lord Blanesburgh.
65 Ibid at 394.
[W]hat the Parliament of Canada may do in this matter it may also forbear to do, and permissive Provincial legislation effective for its purpose, because the Parliament of Canada has not previously intervened at all, can be no less effective after such intervention if by its very terms the previous liberty of the Provinces in this matter remains unaffected. In each case, the Provincial Legislature is exercising a power which, in the one case by silence and in the other case in words, the Parliament of Canada has left intact.

What the Privy Council seems to be saying here is that, because Sunday activities were not criminal until the federal Act was passed in 1906, and because that statute preserved provincial powers in this sphere, the federal legislation did not expand provincial jurisdiction as a true interdelegation would, and that it therefore constituted valid referential legislation.

Driedger indicates that the decision has inherent weaknesses.(66) First the form used in the federal legislation was delegation. That is, the statutory formula "except as provided by any provincial Act or law now or hereafter in force" constituted an express invitation to the legislatures to make exceptions to criminal offences. Further, in order to determine the competence of a provincial statute enacted after the federal Act, it should be read in its whole context, which must include that federal statute. That fact, in Driedger's estimation, is relevant in determining the "pith and substance" of the provincial legislation. Even if it is an Act which the

66 Driedger supra fn. 34 at 706.
province could enact apart from the federal statute, it might not, in this context, be related to any of the stated heads of provincial powers. Looked at from this perspective, the Manitoba statute, standing alone, hardly made sense. Examined rationally, what it did was define what is not a crime.(67) Accordingly, the province was exercising a delegated power.

Even accepting the judgement in Lord's Day Alliance at face value, it has questionable applicability in assessing the validity of s.207 of the Code. In that section, there is no question of Parliament coming fresh to the field of prohibiting lotteries and games of chance, and preserving "intact" a valid provincial power. As has been demonstrated, the prohibition of gaming has been part of Canadian criminal law since the colonial era. Thus, although Driedger maintains that s.207 is not a delegation of power as, in the absence of the prohibition, a provincial legislature could regulate lotteries as being property and civil rights,(68) if one applies his criticisms of the Lord's Day Alliance case, his position is untenable. Existing by itself, the provincial regulation of lottery schemes tells only half the story. The federal provision enables the provinces to act in a sphere from which they would otherwise have been excluded. This section does not merely 'borrow' independently valid

67 Ibid.
68 Ibid at 705.
provincial enactments. The latter would be invalid but for the terms of s.207 itself.

A more recent examination of the format of the Lord's Day Act by the Supreme Court of Canada basically duplicated the Privy Council position. In Lord's Day Alliance v. Attorney General for British Columbia, (69) it unanimously upheld the validity of a Vancouver by-law exempting the municipality from the operation of portions of the Lord's Day Act. It was adjudged to be a "misconception" of the operation of the Act to say that its effect was to create a delegation of federal power to the provinces. In Mr. Justice Rand's view, it could not be open to serious debate that Parliament may limit the operation of its own legislation and may do so upon any event or condition. (70)

Both Hogg and Weiler, eminent constitutional law scholars, are critical of this decision in a way that is also damning for s.207 of the Code. For example, Hogg comments that if the making of Sunday observance law is a matter of criminal law outside provincial competence, as was decided in Hamilton Street Railway, then the repealing of a Sunday observance law is equally a matter of criminal law outside provincial competence. The Vancouver by-law had no significance except as a removal of a criminal prohibition,

70 Ibid at 509-10.
which is outside provincial competence as surely as the imposition of a criminal prohibition. He concludes that the decision is inconsistent with the Nova Scotia Interdelegation case.\(^{71}\) Similarly, Weiler characterizes the opting-out clause in the Lord's Day Act as amounting, functionally, to Parliament delegating to provincial legislatures the power to amend its criminal law in accordance with different and changing sentiments in the respective provinces.\(^{72}\)

In true referential legislation, where Parliament adopts a particular piece of existing provincial legislation for its own use, it is easy enough to distinguish it from an interdelegation of power. It is, in Lysyk's words, "a legislative short-cut".\(^{73}\) But where future provincial enactments are involved, as is the case with the lottery scheme exemption, the incorporation is, in reality, delegation by another name. Judicial ingenuity has, however, confined the prohibition against interdelegation to a narrow range. As a result, Lysyk concludes, "the doctrine is one which may test the ingenuity of, but seems unlikely to confound, a careful draftsman".\(^{74}\) Nonetheless, Weiler

\(^{71}\) Hogg supra fn. 17 at 306-07.


\(^{74}\) Ibid at 277.
cautions that, because the distinction between referential or conditional legislation and interdelegation is essentially one of name rather than of substance, the Supreme Court has left itself free to resurrect the latter when and if it may wish to do so some time in the future.\(^{(75)}\)

By limiting the interdelegation doctrine to such narrow confines, the courts have facilitated constitutional flexibility. In effect, they have conceded that the executives of the federal and provincial governments are primarily responsible for the distribution of legislative authority where there is mutual agreement.\(^{(76)}\) One viewpoint is that this means of effecting informal constitutional change is essential to national survival. Co-operative federalism through federal-provincial negotiations and agreements allows an on-going redistribution of powers without recourse to the courts or to the formal amending process.\(^{(77)}\)

The other side of the coin are the costs to be paid for constitutional flexibility. *De jure* or *de facto* delegation

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75 Weiler *supra* fn. 72 at 106-7.
76 *Ibid* at 317.
77 Hogg *supra* fn. 17 at 106-7.
runs the risk of creating either an over-powerful central government or a toothless federation. It may encourage pressure by one level of government on the other to transfer powers which would be better exercised by the level of government to which they were given.(78) Further, constitutional flexibility, in the guise of co-operative federalism, reduces the accountability of governments to their legislative bodies and electorates and gives politicians plausible reasons for failing to act when action is clearly needed.(79) Smiley offers the following assessment of the fundamental defect of such flexibility:(80)

[T]he federal system is cut adrift from its constitutional base and becomes a regime shaped decisively by the bargaining powers of the federal and provincial governments rather than by legal norms.

One segment of the population which is experiencing the tangible costs of the questionable process used to decriminalize lottery schemes is Canada’s aboriginal peoples, specifically native Indians. This new arrangement, to which they were not a party, purports to subject them to provincial jurisdiction in the matter of lottery schemes. If Indians bands wish to conduct gambling operations on Indian

78 Canadian Bar Association, Toward a New Canada, quoted in Magnet, Constitutional Law of Canada (Toronto: Carswell, 1983) p. 93.


80 Ibid at 54.
lands, they must, the federal and provincial governments argue, seek a provincial licence. The complex dimensions of this claim and the counterclaims will be examined in the next chapter.
CHAPTER FIVE

INDIAN GAMING

In the last two decades, Canada's indigenous peoples have been engaged in a rejuvenated campaign for legal recognition of aboriginal title to certain lands and for some measure of political autonomy or right to self government. Regarding the native Indian population, as distinct from the Metis and Inuit peoples, the White Paper released in 1969,(1) which proposed to dismantle the apparatus of the Indian Act,(2) and eliminate any vestiges of special status accorded to Indian peoples, is considered by many to be "the single most important catalyst" in raising the political consciousness of Indian peoples.(3) Coincidentally, this is the same time span that has accommodated the spread of legalized gambling in Canada in the form of lottery schemes.

These two distinct developments have merged in the last few years as several Indian bands across the country, following the example set by Indian tribes in the United

States, have sought to conduct organized gambling activities, particularly bingos, on reserves, without the requisite provincial licences. This has led to criminal charges being laid, resulting in convictions in some instances, albeit with symbolic penalties, and in stays of proceedings being entered in others. (4) The basic issue is one of jurisdiction. The bands and the provinces are each claiming the right to regulate gambling on reserves, while the federal government maintains that it has no jurisdiction in this sphere.

This chapter will examine the merits of these competing jurisdictional claims, focussing in particular on the applicability of provincial enactments such as a lottery licensing scheme to Indians and Indian lands, as well as on assertions of native sovereignty. Given the parallel situation in the United States, some attention will also be directed to the legal situation there for comparative purposes.

4 Indian and Northern Affairs Canada (INAC), Gaming on Reserves (Ottawa:INAC,1987) Annex J, details some of the charges and confrontations which have arisen in the last few years.
An Introduction to Indians and the Indian Act

In order to provide a context for the analysis which follows, it is necessary to begin with some brief remarks regarding the legal position of Indian peoples in Canada.

Although there was an initial semblance of willingness to treat the Indians as having some form of sovereignty, as evidenced by the treaties made with the British Crown, the European settlement of Canada ultimately meant political, legal, social and cultural subservience for her native peoples. At Confederation, the power to legislate for "Indians and Lands reserved for Indians" was assigned to the federal arm of government by section 91(24) of the Constitution Act, 1867. As Ponting and Gibbins indicate, this allocation of Indian issues to the federal level can be traced back to an earlier concern of the Imperial government in London that the chief threat to the native population would likely come from land-hungry settlers who also controlled the local and provincial governments. In 1867, the federal government was the most distant from local government, where it existed, and the only alternative where

5 30-31 Vict., c.3 as amended.
it did not (i.e. the western territories).(6) This is echoed by Sanders:(7)

"[T]he decision to give responsibility to the more distant level of government removed Indian policy from direct competition with local interests."

The legislative policy of the federal government under this head of power did not, however, depart dramatically from that of pre-Confederation enactments which were designed to "civilize" the Indians and assimilate them into the dominant culture. The Indian Act, which was first passed in 1876 was merely a consolidation of pre-existing provincial and territorial legislation that dealt with Indians.(8)

The general scheme of the Indian Act, operational to this day, is essentially paternalistic. It prescribes a complex system for defining and registering Indians, administering their lands and regulating their lives.(9) The ultimate responsibility rests with the federal government minister charged with Indian affairs, and this despite the fact that, since the very early days, powers of local government have devolved on the individual reserves. The Act


tinkered with tribal arrangements to produce a system of band councils which possess "very modest" by-lawmaking powers.(10) As one commentator notes, this creates a fundamental inconsistency between the encouragement of local self-government on the reserves and the insistence on total control in the hands of the Minister.(11)

The by-lawmaking powers, which are now found in s. 81 of the Act, are generally confined to matters with which a rural municipality would be concerned. They are, of course, subordinate to regulations enacted pursuant to the Indian Act but also to the more pernicious power of disallowance vested in the Minister of Indian Affairs by virtue of s. 82 of the Act:

"s.82(2) A by-law made under section 81 comes into force forty days after a copy thereof is forwarded to the Minister pursuant to subsection (1), unless it is disallowed by the Minister within that period..."

As will be shown, this power of disallowance is very important in the context of lottery schemes, as many bands have attempted to enact by-laws to authorize gambling operations. All except one have been disallowed by the Minister.

The Indian Act is undeniably extensive in its ambit. As Hogg points out, Parliament has taken the view that it may


11 Bartlett, supra fn.8 at 584.
legislate for Indians on matters which otherwise would lie outside its jurisdictional competence e.g. the rules which govern the succession to the property of deceased Indians. He suggests that while there might be some question whether these enactments are in pith and substance in relation to Indians or to lands reserved for Indians, the courts would probably uphold any provision which could be rationally related to intelligible Indian policies.(12)

Extensive though the Indian Act may be, it is certainly not exhaustive. Other federal statutes, such as the Criminal Code and the Fisheries Act apply on reserves independent of the Indian Act, and in fact may prevail over it. In other words, legislation is applied to the native population that is not tailored to meet their particular needs and values.(13) Beyond that, provincial laws of general application have moved to fill in other gaps. Before 1951, however, the application of provincial legislation to Indians tended to depend on whether the incident concerned took place on or off a reserve. The courts allowed only very limited provincial jurisdiction on reserves.(14)

In 1951, what is now section 88 of the Indian Act was introduced. It makes all provincial laws of general

13 Morse, supra fn.9 at 8.
14 Bartlett, supra fn.8 at 603.
application applicable to Indians, subject to treaties and federal legislation, and except to the extent that they conflict with the Act and its regulations. This amendment has been characterized in both positive and negative terms. Hogg, for example, states that s. 88 does not expand the body of provincial law that applies to Indians, but in fact limits it. (15) Bartlett, on the other hand, is of the opinion that s. 88 represents a "massive intrusion of provincial jurisdiction" into the powers of government to which band councils might otherwise lay claim. (16) It unquestionably legitimated a role for provincial governments on Indian reserves which, by its own terms, is limited only by treaties, where they exist, and by the presence of federal enactments. In turn, it may preempt band by-laws.

With the entrenchment of the Constitution Act, 1982, (17) there now exists the potential for limits on the provincial and federal legislative presence on the reserves by virtue of section 35(1):

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Hence, to the extent that any legislative enactment conflicts with an existing aboriginal or treaty right, it will be of no force or effect.

15 Hogg, supra fn.12 at 561.

16 Bartlett, supra fn.8 at 607.

17 Enacted by the Canada Act, 1982 (U.K.) c. 11, Schedule B.
A complex legal situation thus prevails in relation to "Indians and lands reserved for Indians". Federal, provincial and native governments constitute an uneasy, often unco-operative partnership, in which the partners do not have equal access to power. The redistribution of power vis-a-vis lottery schemes is a good illustration of this power differential. Indian bands were not a party to the negotiations which took place in the early 1980s to resolve the federal-provincial struggle over lotteries, nor were they consulted by the Senate Committee on Legal and Constitutional Affairs when it was examining the Criminal Code (Lotteries) Amendment Bill. None of the exemptions laid out in s.207 of the Code allow for Indian band councils to operate permitted lottery schemes. Indian interests were, at best, overlooked and, at worst, ignored. It seems to have been taken for granted that they should be treated exactly the same as each provincial population concerned, subject to provincial regulatory schemes, regardless of whether they were appropriate to band needs and aspirations.

Given the experience in the United States in the past 15-20 years, this statutory silence and assumption of identical regulatory treatment was extremely short-sighted. When legalized gambling, particularly lotteries, began to spread through the American states in the late 1960s and early 1970s, some American Indian bands began running so-

18 Bill C-81, 1st Sess. 33rd Parl, 1984-85.
called "monster" bingo games, card rooms and other gambling enterprises, generating substantial revenues, without state sanction. State and county governments then instigated legal action against the bands concerned. In 1987, the United States Supreme Court rendered a decision in one of these cases which endorsed the right of Indian tribes to conduct gambling operations on their lands in certain situations.(19)

If Canadian Indian bands continue their current gaming practices, there is an extreme likelihood that the Supreme Court of Canada will be called upon to decide the legal merits of these actions. Accordingly, before analyzing these merits, the American experience will be examined as it offers some enlightening comparisons.

**Indian Gaming in the United States**

What Rose has termed the "third wave"(20) of legalized gambling in the United States began in the mid-1960s with state lotteries and has grown to encompass the transformation of New Jersey into a destination casino

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Legalized gambling has become the biggest growth industry of the 1980s on the nation’s Indian reservations. At least 100 of the 283 Indian tribes in the United States are considering setting up bingo games on tribal land. The Rincon Indian Tribe is the third tribe in San Diego County to set up high-stakes gambling. The tribe, with only 500 members, is building a bingo hall that will seat 1,000. The Seminole Tribe in Florida reported that its bingo operation grossed more than $20 million in 1982, resulting in a net profit of $2.7 million for the tribe’s 1,500 members. Similar operations have been set up in Maine, Minnesota and Washington."

This has provoked vehement state opposition. As one observer notes, to the states, counties and cities involved, it seems to signify an appropriation of their right to govern, "a menacing intrusion on local control and on state plenary powers". (22)

At the federal level, however, the response has been more positive. For example, the Department of the Interior, which has the primary responsibility for Indian Affairs in the U.S., has made grants and has guaranteed loans for the purpose of constructing bingo facilities. (23) The Secretary of the Interior has approved tribal ordinances establishing and regulating gaming activities. (24) The federal government

21 Ibid at 210.
22 DeDomenicis, "Betting on Indian Rights" (1983) 3 California Lawyer 29.
is on record as being opposed to a proposal mooted in the early 1980s to give the states control of gambling activities on reservations:(25)

"Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983 [26]...A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue producing activities, it is believed that this kind of revenue producing possibility should be protected and enhanced."

Consequently, Indian gaming is at the centre of a struggle between the states to assert their jurisdiction and the Indian tribes to reject it. This struggle is a recurring one and requires some elucidation.

Canada and the United States have adopted largely parallel policies vis-a-vis their Indian populations, vacillating between assimilation and separation, but always exerting paternalistic control.(27) American courts have, however, been more prepared than their Canadian counterparts

25 These statements were relied on in California v. Cabazon Band of Mission Indians at the Court of Appeals level: 783 F.2d 900 at 904-5 (1986).

26 "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." Quoted in California v. Cabazon Band of Mission Indians, supra fn. 19 at 4229

27 Mason, supra fn.3 at 423.
to play at least lip service to the notion of Indian sovereignty.

The constitutional arrangements in the United States are somewhat different from those in Canada. Indian affairs are only peripherally referred to in the Constitution:(28)

"Congress is authorized to regulate Commerce...with the Indian Tribes."

This is the only express grant of federal power over Indians. There is no direct American equivalent to s. 91(24) of the Constitution Act, 1867. Since the decision of the U.S. Supreme Court in United States v. Kagama,(29) this constitutional gap has been irrelevant. While the Court recognized that there was no explicit constitutional justification for federal assertions of jurisdiction over Indians and Indian land, it decided that that power must rest with either the states or with the federal government. The Court opted for an inherent power over Indian affairs vested in the federal level of government. Indian autonomy over Indian affairs beyond a narrow range was not given any consideration.(30)

28 United States Constitution, article 1, paragraph 8, clause 18 (Indian Commerce Clause).

29 118 U.S. 375 (1886).

30 For a trenchant criticism of this decision as well as of U.S. Indian policy as a whole, see Kronowitz et al., "Towards Consent and Cooperation: Reconsidering the political Status of Indian Nations", (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 507.
The exclusion of state interests on Indian reserves, characterized by one source as being "an insurmountable wall" from 1831-1882,(31) has, however, been eroded by the courts over the last century. As Kronowitz et al. note, many states have extended their legal controls over Indians and Indian lands situated within state borders, and have been supported in this by the Supreme Court.(32) The Court now subscribes to a view that Indian reservations are a part of the surrounding state.(33) State laws will therefore apply unless they have been preempted by federal legislation.(34) This expansion of state interests has been achieved, not at the cost of federal power, but at the expense of Indian interests:(35)

"[Recent Supreme Court] decisions...reverse the long-standing presumption of the exclusion of state jurisdiction over Indians and establish a presumption of state jurisdiction unless Congress has specifically pre-empted state law. Taken together, they potentially leave no area of tribal jurisdiction untouched by the states. The Court's decisions necessitate Indian challenges to state action through expensive and time-consuming litigation, and provide strong incentives for states to assert their jurisdiction over Indians and Indian territory within their borders."


32 Kronowitz et al., supra fn. 30 at 561.

33 Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Rice v. Renner, 463 U.S. 713 (1983). In the latter decision, Madam Justice O'Connor stated (at 723) that "'absolute' federal jurisdiction was not always exclusive jurisdiction".


35 Kronowitz et al., supra fn.30 at 569-70.
Putting aside this discussion of the expansion of state controls on Indian reserves temporarily, it should also be noted that, unlike its Canadian counterpart, the United States constitution vests the criminal law power in the states. Consequently, the federal government preserved its jurisdiction over Indian affairs by creating a separate system of criminal laws for the reserves.

The General Crimes Act (36) sets out the powers of the federal government to punish offences by non-Indians against the person or property of Indians, and offences by Indians against the person or property of non-Indians. The Major Crimes Act (37) also gives the central government jurisdiction over fourteen specific offences committed by Indians on reserves. These serious offences aside, tribal governments have exclusive jurisdiction over crimes committed by Indians against Indians occurring on tribal lands. The states, on the other hand, have exclusive power over all off-reservation crimes involving non-Indians and Indians.

This arrangement begs the question of who has jurisdiction over crimes committed by non-Indians on reservations. In Oliphant v. Suquamish Indian Tribe, (38) the

Supreme Court held that the states had that power, rejecting the Indian claim that the tribal courts had jurisdiction.

The final component of this jurisdictional scheme regarding criminal law, is the federal enactment Public Law 280,(39) which has proved to be the most significant legislative factor in Indian gaming litigation. Enacted in 1953, this statute delegates to the states some of the federal government's power to regulate activities on reservations.(40) Congress had expressed some concern regarding apparent lawlessness on some reservations and in response granted the six states with the largest Indian populations (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) complete criminal jurisdiction and more limited civil jurisdiction over reservations within their borders.(41) Any other state could assume such jurisdiction by statute or state constitutional amendment, which has added another nine states to the list.(42) Since 1968, however, tribal consent to state jurisdiction is required.(43)


41 DeDomenicis, supra fn.22 at 31.


The Supreme Court first considered **Public Law 280** in *Bryan v. Itasca County*,(44) which focussed on the application to Indians of the rather ambiguous grant of civil jurisdiction which was also included in the Law. The Court held that the states were only granted civil jurisdiction over private civil suits between Indians and Indians and between Indians and non-Indians. The Court reasoned that tribal governments would be rendered toothless if they were subject to the full spectrum of state and county civil regulations. The Court created a careful distinction between the criminal and civil sections of **Public Law 280** which was to become crucial in the Indian gaming decisions.

Turning specifically to gambling, the federal government enacted prohibitory legislation in 1951 which provides that it is illegal to operate a gambling device within the boundaries of an Indian reservation.(45) The term "gambling device" encompasses slot machines, roulette wheels and similar devices. It would not necessarily affect bingo games.(46) **The Organized Crime Control Act of 1970**, (47)


46 Indeed, in *United States v. Farris*, 624 F.2d 890 (1980), a prosecution brought against the Puyallup Indians who were operating a casino, the limited range of this enactment was noted as was "the conspicuous caution" of the casinos to avoid the use of gambling devices which would be caught by it (at 896).

which makes illegal gambling a federal offence, also applies on reservations, but only if they are situated in states where gambling is a violation of state law. As was mentioned earlier, gambling has been legalized in the majority of states in the Union.

**Indian Gaming Before the Courts**

Prior to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* the Indian gaming cases fell into two categories: those based on Public Law 280 (PL 280) and those invoking the Organized Crime Control Act (OCCA). The former comprise the larger group and will be considered first.

As has been noted above, PL 280 contains a grant of power from the federal to the state level of criminal and civil law jurisdiction on Indian reservations and the Supreme Court had been careful to limit the scope of the civil powers. In *Seminole Tribe of Florida v. Butterworth,* the Fifth Circuit considered whether PL 280 acted to make Florida's bingo statute applicable to the Seminole tribe's bingo operations. The Florida statute

48 Supra fn.19.

permitted small scale, charitable bingos. The Seminoles operated a permanent, commercial facility.

Relying on the Supreme Court's decision in *Bryan v. Itasca*, the Court determined that, if the statute was classified as "prohibitory" or criminal, it would apply; if it were designated "regulatory" or civil, however, it would not. It was observed that one could not simply point to the inclusion of penal sanctions in the Florida statute and conclude that it was prohibitory. A much more sophisticated analysis was required, focusing on the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute. This analysis produced a determination that the bingo statute was "civil-regulatory" in nature and hence not applicable to the Seminole operations:(50)

"Bingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses. Where the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed....Legislative intent determines whether the statute is regulatory or prohibitory, and although the state of Florida prohibits lotteries in general, exceptions are made for certain forms of gambling including bingo."

In other words, as long as the state permits bingo to some degree, then the Indians are free to operate bingos without state constraint. It is not clear whether the Court was

50 Ibid at 314-15.
going so far as to say, that as long as the state permitted some forms of gambling that the Indian tribes could operate any and all forms of gambling operations. What is more important, though, is that the Court took as its reference point the state's legislative policy. That, not Indian interests, was to be the decisive factor.

A similar case, Oneida v. Wisconsin,(51) reached a similar conclusion. The State of Wisconsin permitted the playing of bingo, but regulated the conduct of games by licensing, control and taxation. Again, the Court was faced with the task of categorizing the nature of these bingo laws in order to determine whether they would apply to Indian-run operations. Employing the analysis used in Seminole Indians, it concluded that they were civil rather than criminal.

The Wisconsin Chief Judge was, however, reluctant simply to leave it at that, finding it "too mechanical" an approach.(52) He chose to buttress his finding by presenting it against a so-called "back-drop" of tribal sovereignty. He recognized the continued existence of sovereign rights inhering in the Indian tribes, though in a much more restricted form than they did 150 years ago, and the historically limited role for state intervention on tribal

52 Ibid at 719, per Crabb, Chief Judge.
lands. (53) These deliberations produced the following conclusion: (54)

"Keeping in mind the backdrop of Indian sovereignty against which Public Law 280 must be measured, as well as that 'eminently sound and vital canon ... that statutes passed for the benefit of dependent tribes ... are to be liberally construed, doubtful expressions being resolved in favour of the Indians', ... I conclude that when Congress conferred jurisdiction on the State of Wisconsin to enforce its criminal laws on the Oneida Reservation, Congress intended to limit the exercise of that jurisdiction to enforcement of laws generally prohibiting activities that the state determined are too dangerous, unhealthy, or otherwise detrimental to the well-being of the state's citizens. ...[This] conclusion ... appears to be in keeping with present federal policy encouraging tribal self-government."

With its concern to respect tribal sovereignty by limiting state jurisdiction, Oneida, in moving away from the narrow classification issue, is overall the most favourable of the cases for Indian interests.

In Barona Group of Capitan Grand Band v. Duffy, (55) the Southern District Court of California rendered a decision consistent with the Florida and Wisconsin cases. California permitted some bingo games albeit under strict regulation. Indian tribes were not bound by those civil enactments. Although not as dismissive of Indian interests as the court in Seminole Tribe v. Butterworth, the court in Barona focussed mainly on the classification issue, noting that it

53 Ibid at 715.
54 Ibid at 720.
55 694 F.2d 1185 (1982).
was a close question and "not susceptible of easy application". (56)

This difficulty was acknowledged by the U.S. Supreme Court in California v. Cabazon Band of Mission Indians. (57) In a 6:3 decision, the Court endorsed the classification scheme adopted in the lower courts for determining whether state laws applied to Indian reservations by virtue of PL 280. This ratification was, however, rather lukewarm: (58)

"It is not a bright-line rule, however; and ... and argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court [of Appeals] reexamined the state law and reaffirmed its holding in Barona, and we are reluctant to disagree with that court’s view of the nature and intent of the state law at issue here."

The Court was careful to point out that each state law must be examined in detail before they can be characterized as regulatory or prohibitory. (59)

If the decision had rested there, it would merely have been subject to the criticism levied against Seminole Tribe v. Butterworth, i.e. that state policy is the determining factor. But, like the Wisconsin court in Oneida, the Supreme Court was compelled to place the classification scheme for PL 280 in a larger context. In this instance, however, it

56 Ibid at 1189.
57 Supra fn.19.
58 Ibid at 4227.
59 Ibid.
was not a back-drop of tribal sovereignty, but the general issue of state jurisdiction on reserves.

From the outset, the Court underlined that it had not, in previous decisions, established "an inflexible per se rule" precluding state jurisdiction over tribes and tribal members in the absence of congressional consent.\(^{60}\) Indeed, the Court recognized a role for the state regardless of the federal position "if the state interests at stake are sufficient to justify the assertion of state authority".\(^{61}\) Accordingly, there was to be a balancing of federal, state and Indian interests in determining the applicability of state laws to Indian lands. The state interest asserted in Cabazon was the prevention of organized crime. The legitimacy of this concern was recognized, but, in the absence of any evidence of organized criminal involvement in the Cabazon gambling operations, the Supreme Court was not prepared to override "compelling" federal and tribal interests of encouraging tribal self-sufficiency and economic development.\(^{62}\) What this implies is that if there is some degree of evidence of organized crime (however that might be defined) on Indian reservations, then state

\(^{60}\) Ibid at 4228.

\(^{61}\) Ibid at 4229, quoting from New Mexico v. Mescalero Apache Tribe, 462 U.S. at 334.

\(^{62}\) California v. Cabazon, ibid at 4230.
legislation, whether or not it is merely "regulatory" will apply.

To summarize the *Cabazon* decision: the Supreme Court constructed a two-pronged test for determining state jurisdiction on Indian lands under PL 280. First, should the state legislation be characterized as criminal-prohibitory or civil-regulatory? Secondly, even if it is designated a civil enactment, are state interests sufficiently important to make it applicable nonetheless?

Regarding the first aspect of this test, Turner criticizes it as assimilationist, because tribal interests are held in abeyance while the policy interests of the state are assessed. This, he argues will produce non-uniform and incongruous results due to policies which vary dramatically from state to state.(63) This criticism pales beside the one offered by Kronowitz et al., which is directed at the second aspect of the *Cabazon* test. It deserves to be quoted in full:(64)

"Even more dangerous to the future of tribal self-government, however, was the Court's deference to state interests. ... The Court refused to recognize that the critical interest at stake is the sovereign right of the tribes to govern reservation affairs free from state intrusion. In failing to do so, *Cabazon* illustrates the modern Court's continuing willingness to use unique factual situations to render general,


64 Kronowitz et al., supra fn. 30 at 583.
open-ended opinions in Indian law. The rationale used by the Court, although granting a short-term victory for the Indian plaintiffs in *Cabazon*, may easily be applied to the detriment of other tribes seeking protection from state jurisdictional intrusion in the future."

It is fair to say that the Supreme Court’s decision is perhaps not as benign as it may first appear to be.

In *Cabazon*, the applicability of the Organized Crime Control Act (OCCA) to Indian gambling operations was also considered. The Court recognized that there was a conflict between the decisions of the lower courts on this issue. In *U.S. v. Farris*,(65) for example, the Puyallup Indians in Washington were running casinos without any approval or licence from the State Gambling Commission. Although PL 280 had been adopted by the state, it covered only eight specific subject areas, and gambling was not included in them. Having acknowledged this, the court then considered whether the casino operations violated OCCA’s prohibition of illegal gambling. As was indicated earlier, there must therefore be a violation of state law for OCCA to apply. The state of Washington allowed some forms of gambling, but it had strict regulations against professional gambling. These regulations did not, however, apply to Indians on Indian land. Nonetheless, it was held that OCCA was applicable because the casino operations contravened the state’s public policy against professional gambling. The judge who

65 624 F.2d 890 (1980).
dissented in this case summed up the logical difficulties with this view:(66)

"It exceeds the limits of reasonable construction to hold that conduct which could not be punished under the state law is nonetheless "a violation of the law of [the] State" within the meaning of 18 U.S.C. # 155. Conduct to which the law is inapplicable does not violate the law in the ordinary meaning of those words. The idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness."

**Farris** was applied to the OCCA argument raised in **Barona**.(67) The California court explained that whether a tribal activity is "a violation of the law of a state" within the meaning of OCCA depends on whether it violates the "public policy" of the state, the same test for application of state law under PL 280. Hence, it concluded that the Barona's bingo operations were not contrary to the public policy of California. This merging of the tests for OCCA and PL 280 would appear to limit the applicability of the federal enactment to those states in which gambling is completely prohibited.

Compare this interpretation with the decision in **U.S. v. Dakota**, (68) where the Michigan court stated that although the state legislation was not applicable to Indians on Indian land, it could be incorporated by reference into OCCA

66 *Ibid* at 898 per Browning, Circuit J.
67 *Supra* fn.55 at 1190.
68 796 F.2d 186 (1986).
to determine whether the gambling was illegal. There was no need, therefore to divine state "public policy" on the issue; if Indians engage in gambling operations above statutorily defined levels which are illegal off the reserve under state law, this is a violation of OCCA. This approach was justified on the basis that OCCA is a federal statute and raises no danger of encroachment on Indian sovereignty by the states. (69) There is certainly no direct state encroachment, but the incorporation of state statutory standards in federal legislation has exactly the same impact on Indian autonomy as if they were applied directly.

The Supreme Court in Cabazon chose not to resolve this inconsistency, but it did make an observation which will likely limit the use of OCCA against Indian gambling operations:(70)

"There is nothing in OCCA indicating that the States are to have any part in enforcing federal crimes or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government."

In the wake of the Supreme Court's decision in Cabazon, the federal government reactivated earlier, failed efforts to legislate a regulatory scheme for gambling operations in

69 Ibid at 188.

70 California v. Cabazon, supra fn. 19 at 4228.
Indian country. In 1983 a bill known as the **Indian Gambling and Control Act** had been introduced in Congress.(71) Designed to meet concerns regarding the supervision of tribal gambling activities, it proposed to establish minimum federal standards by requiring the adoption of tribal ordinances to regulate gambling operations and by requiring background checks on individuals and management firms involved in the tribal gaming operations. Further, the Secretary of the Interior would have to approve all tribal gambling ordinances and management contracts entered into by an Indian tribe for the operation and management of the gambling operations. This bill failed to pass that session of Congress and was reintroduced in identical form in 1985.(72) In addition a Senate version was also introduced which provided for the creation of Indian-controlled Gaming Commissions to supervise Indian gambling enterprises.(73) Neither of these were passed into law.

Late in 1988, however, in the dying days of the Reagan Administration, the **Indian Gaming Regulatory Act** became law.(74) This Act establishes an National Indian Gaming Commission and a tri-partite regulatory scheme. Traditional forms of Indian gambling are within the exclusive control of

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74 Public Law 100-497, 100th Congress (Oct. 1988).
the tribes; bingo games will be supervised by the Commission; every other form of gambling (e.g. casino games, lotteries, pari-mutuel betting) requires the Indian tribes to enter into a "compact" with the state in which the reservation is situated. Inevitably, this latter provision has provoked extensive criticism and opposition from the tribes, who perceive it as an unjustified encroachment on their sovereignty. Consequently, several court challenges have been launched.

The Indian gaming issue in the United States is, therefore, still the subject of controversy and conflict. It is viewed by the Indian tribes as being important not only in its own right as a vital tool of economic regeneration, but also in a symbolic sense, serving as a focus for the larger issue of Indian sovereignty. The remainder of this chapter will examine the dimensions of the Indian gaming issue in Canada.
The Canadian Context: The Significance of Gambling on Reserves

Indian bands view the right to control gambling on the reserves as important for several reasons. It is, as was indicated in the opening chapter, a traditional pastime of cultural significance for native Indians. For example, Maranda in her ethnological/historical study of the Coast Salish Indians, found that gambling had deep, historic roots in their culture. It served as a form of social expression and as a forum in their polytheistic religion for supernatural power. The gambling games of dice, disc and bone, hand or slahal were seen to be an expression of man's power affiliations. Power was an element which could affect the outcome of each gambling event, and the games would themselves be an endorsement of the "power favour", as they gave tangible and observable verification of the influence of power. The hand, bone or slahal game is the only Coast Salish gambling game of aboriginal origin still being played today. Modern forms of gambling, such as bingo and pull tickets, have taken the place of the others.

75 While much of the succeeding commentary will be applicable to all parts of Canada, attention will often be focussed on the particular situation that prevails in British Columbia since time and space precludes a more comprehensive analysis.


77 Ibid at (vi).
continued significance of the bone game is noted by Starr who observes that the Gitksan on the Skeena River still observe and maintain a traditional chieftain position whose Indian name is "Gambling Chief":(78)

"He derives his power and position of Chief as a result of his skill and cunning in the bone game. The Chief participates equally with other Gitksan chiefs of high rank in their potlach ... Traditionally, the Gitksans gambled for the right to win spoils of war which then became the common property of the house (or clan) of the chief who won it. The communal ownership of gambling winnings is in keeping with the fundamental and unique Indian philosophy of communal ownership of property."

Gambling has, therefore, always been a socially acceptable activity in Indian communities and remains so. As in other communities, bingo and other forms of gambling play an important social function. Increasingly, however, band councils are coming to appreciate the revenue generating potential that gambling has for the reserves. In British Columbia, for example, the Gitksan is one of the bands running its own bingo operations, the proceeds from which are kept in the community for projects such as community and treatment centres and funding court challenges.

In recent years, there has been increasing attention given to economic development on reserves. In part, this stems from the federal government which wants to reduce Indian dependence on federal funding. But it also reflects a

78 "Submission to the Task Force on Gaming on Reserves", in INAC, Gaming on Reserves, supra fn.4 at 35.
determination on the part of the bands to reassert control over their own affairs.

Economic dependency stems directly from the structure of the Indian Act and its underlying philosophy of paternalism. Under the terms of this legislation, Indian land is protected by provisions which exclude Indian people from taxes, liens, mortgages or other charges on their lands. These provisions have, however, made it difficult for Indians to enter the modern debtor society. Ponting and Gibbins observe that they have made it next to impossible for Indians to raise outside investment capital, for potentially valuable Indian land cannot be mortgaged so that there is reliance on the federal government for the capital needed to promote economic development. The ostensibly protective provisions of the Act "now serve as a shackle on Indian self-reliance". (79)

Section 87 of the Indian Act exempts from taxation the interests of an Indian or a band in reserve or surrendered lands and the personal property of the same situated on a reserve. As Bartlett points out, the denial of the ability of other governments to tax a community may secure the autonomy of that community. (80) He further comments that, regardless of the powers of government possessed by a

79 Supra fn. 6 at 10.

80 "Taxation" in Morse (ed.) supra fn. 9 at 579.
community, an exemption from taxation will encourage economic development of that community.(81) That only holds true, however, if the community has resources of its own to finance such development. Political power is, to a large extent, dependent on economic power.

The legislation which protects Indians from external taxation also largely prevents them from developing their own tax base. Section 83 of the Indian Act provides that where a band "has reached an advanced state of development, the council of the band may, subject to the approval of the minister make by-laws for" inter alia "the raising of money by the assessment and taxation of interests in land in the reserve of persons lawfully in possession thereof". A government task force recently concluded that band taxation powers are underdeveloped due to the limitations set out in s. 83 and that this is incompatible with the basic need of bands for tax revenue to pay for the infrastructure required to attract and support business.(82)

Even if more liberal taxation powers were given to the bands there is a real question of whether, given the socio-demographic profile of many Indian bands, they would have much impact. A study of Indian lands in British Columbia and

81 Ibid.

the Yukon in the late 1970s found that the vast majority have a population of 300 or less and that this small size creates problems. They lack the minimum population, especially in the labour force age group, to sustain viable economic development enterprises, and their populations are too small to permit the band to realize economies of scale in the delivery of services. (83) Limited business opportunities and high unemployment are hardly factors conducive to the nourishment of a healthy tax base. A recent government review of gaming on reserves offered the following assessment: (84)

"Most Indian communities are on the periphery of the Canadian economic system regardless of their geographic location. This is especially so in the remote areas where there tend to be few economic opportunities. There is a limit to the number of jobs, even low-skill jobs, in the primary resources sector. Moreover, given the existing fiscal restraint, government funds cannot be expected to meet all economic development requirements.

Many bands do not have an adequate tax base on which to raise significant funds additional to what is provided by federal budgeting which must concentrate first on critical areas of need such as housing. In these circumstances, gaming provides a rare opportunity for the bands to raise revenues for community purposes by "voluntary taxation." (85)

83 Ponting and Gibbins, supra fn. 6 at 36. The recent task force on Indian economic development also concluded that small markets on Indian reserves have stunted the growth of the retail and manufacturing sectors of the native business community - INAC. Task Force on Indian Economic Development, supra fn. 82 at 11.

84 INAC, supra fn. 4 at 13.

85 By attracting non-natives onto the reserves to play bingo etc. the bands would not be wholly reliant on their own members to generate revenues. Such enterprises would also
The Task Force might also have mentioned that federal provincial conflict over the provision of social services on reserves has compounded the situation. The provinces acknowledge that the federal government has the right to legislate regarding Indians and the lands reserved for them. Some go further to assert that the federal government has the total responsibility to legislate and provide services for Indians on reserves. The federal government's position is that while it has the constitutional right to legislate on (and provide services to) Indians, where it chooses not to exercise that right, the normal division of powers set out in the constitution prevails. (86) In the area of social services, therefore, the provinces would, in the absence of federal action, be responsible for the provision of these costly services. In many instances, the provincial governments have chosen not to assume this responsibility, resulting in the social impoverishment of the reserves. In the words of one observer, reserve Indians "are caught in a financial squeeze and a jurisdictional conflict". (87)

Gambling revenues offer the opportunity to loosen this vise. As Starr indicates, the general objective of Indian bands in conducting bingos etc. on reserves is to supplement perhaps stem the flow of native gambling expenditures off the reserve.

86 Ponting and Gibbins, supra fn. 6 at 182.
87 Morse, supra fn. 9 at 8.
the annual operating budget that it receives from the federal government. The aim is to draw natives and non-natives onto the reserves to gamble. The profits are used to provide band members with community programs not otherwise affordable under the core funding. (88) It is a way of improving the immediate conditions of life on reserves while at the same time furthering economic autonomy to some degree. Indian peoples recognize that self-government is intertwined with economic development. Without the latter, self-government is a meaningless phrase. (89) Gambling means money and money equates with power. Even if, as the Task Force on Gaming on Reserves suggests, the revenue from gambling is often fairly modest, (90) band-run bingos still represent an affirmation of Indian control over their own lands, that the band councils are the ones to make the decisions as to whether or not any type of activity can be carried out on their lands. The fundamental issue to be resolved here is whether they are legally entitled to conduct gambling operations on reserves without a provincial licence.

There are several possibilities to consider. In the preceding chapter, the constitutionality of the transfer of

88 supra fn. 78 at 2.

89 See the comments made by Chief Gabriel Gopher of the North Battleford District Chiefs to the Task Force on Indian Economic Development, supra fn. 82 at 46.

90 supra fn. 4 at 13-18.
power over lottery schemes from the federal to the provincial governments was scrutinized. This issue has obvious implications for jurisdiction over gaming on reserves. If the transfer of power over lotteries and games of chance were to be struck down as being invalid, gambling would once more be firmly within federal jurisdiction, and any gambling on Indian reserves would, absent any other legally compelling argument, require federal consent. This would at least restore the traditional constitutional arrangements regarding Indian affairs by precluding provincial involvement. As the Task Force on Gaming on Reserves notes, some bands would be willing to accept federal regulation, but for others such an arrangement would be an unacceptable compromising of inherent aboriginal rights over gaming on reserves.(91) For the purposes of the succeeding discussion, however, the constitutional validity of the federal-provincial arrangement will be assumed, without prejudice to the preceding analysis.

Secondly, there are independent arguments to be made that gaming control enactments in some provinces, British Columbia in particular, offend basic principles of administrative law which may affect their legal effectiveness both on and off Indian lands. These issues will be held in abeyance until the final chapter where they

91 Supra fn. 4 at 19. This position will be examined infra, following the discussion of the application of provincial enactments on reserves.
will undergo rigorous analysis. For present purposes, however, their validity will also be assumed.

In the remainder of this chapter, the focus will be on two key questions: whether provincial gaming provisions and licensing requirements are applicable on Indian lands under the terms of s.88 of the Indian Act, and whether Indians on reserves have an inherent right to regulate their own affairs, including gambling.

**Provincial Jurisdiction**

Although the federal government has exclusive jurisdiction over "Indians and Lands reserved for Indians", provincial legislation may apply on reserves if it conforms to s.88 of the Indian Act:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under the Act."

The first issue to be examined is whether provincial lottery and gambling enactments are "laws of general application". One of the key cases on the applicability of

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92 Constitution Act, 1867, s.91(24).
provincial legislation "to and in respect of Indians in the province" is *Cardinal v. Attorney General of Alberta,* (93) in which it was stated that "[n]o statute of the provincial legislature dealing with Indians or their lands as such would be valid and effective, but there is no reason why general legislation may not affect them." Within *Cardinal* one of the main issues in contention was whether or not such provincial laws apply through referential incorporation in s.88 of the *Indian Act,* i.e. its terms become federal law and apply to Indians as such, or whether they apply independently as long as the subject matter comes within provincial jurisdiction. The former view, often referred to as the "enclave theory" - that Indian reserves are federal enclaves from which provincial laws are excluded - was rejected by the majority. It supported the view that s.88 simply declares that, within its terms, provincial laws apply of their own force.

Accordingly, provincial gaming control legislation, to be applicable "in respect of Indians" must at the very least come within one the enumerated heads of s.92 of the *Constitution Act, 1867.* There are several which could encompass a provincial lottery licensing scheme: s.92(9) authorizes the provinces to impose "Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes"; the

provinces have power over property and civil rights (s.92(13)) and also over matters of a local or private nature (s.92(16)).

Three Supreme Court of Canada decisions in recent years have considered the extent to which Indians enjoy immunity from otherwise valid provincial legislation. In *Four B Manufacturing Ltd. v. United Garment Workers of America*, (94) the Court established that a law which is within provincial jurisdiction under s.92 applies to Indians of its own force unless it affects "an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians". It would be virtually impossible to sustain such an argument in relation to provincial gaming enactments in the face of the unqualified, explicit, federal divestment of control over the area found in the *Criminal Code*.

In *Kruger and Manuel v. The Queen*, (95) the Supreme Court held that the term "laws of general application" in s.88 excluded any law that, "by its effect, impairs the status or capacity of a particular group" (emphasis added). More recently, however, the Court limited the scope of this exemption by defining as a law of general application one which has the effect of impairing Indian status, provided that it does not "overtly or colourably ... single out

Indians for special treatment and impair their status as Indians."(96) Consequently, as Monachan and Petter observe, it is the purpose of the law, rather than its effect, that determines whether it is a "law of general application" within the meaning of s.88.(97)

Provincial gaming control provisions would not be excluded from this definition of a "law of general application". The regulations do not preclude native groups which have a charitable or religious purpose from applying for and being granted licences to conduct bingos and other lottery schemes. Indeed, in 1986 the Federal Court of Appeal overruled the Minister of National Revenue and granted a native Indian organization charitable status under the Income Tax Act.(98) Nonetheless, as Starr comments, although most Indians and Indian bands are poor, they are neither charitable nor religious organizations.(99)

Even if a provincial enactment qualifies as a "law of general application" its application to Indians will be precluded if it is inconsistent with the Indian Act "or any

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99 Supra fn. 78 at 10.
order, rule, regulation or by-law made thereunder". As was noted above,(100) s.87 of the Indian Act provides an exemption from taxation for the property interests of Indians on reserves as follows:

"... the following property is exempt from taxation, namely:
(a) the interest of an Indian or a band in reserve or surrendered lands; and
(b) the personal property of an Indian or band situated on a reserve;
and no Indian or band is subject to taxation in respect of the ownership, occupation or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property;".

For the purposes of s.88, it must be determined whether or not the licensing of gambling activities can be categorized as a form of taxation from which reserve Indians are exempt. As Bartlett points out, s.87 will afford an exemption only in respect of taxation; it affords no protection to financial levies which are otherwise classified.(101) The courts have distinguished between taxes and licences in the application of s.87 of the Indian Act. For example, in Attorney General for Quebec v. Williams,(102) the Court, in considering the nature of a one dollar licensing fee under provincial tobacco tax

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100 See fn. 79 and surrounding text.

101 Bartlett, Indians and Taxation (Saskatoon: Native Law Centre, 1980).

102 (1944) 82 C.C.C. 166 (Quebec Ct. Sess.).
legislation, drew a distinction between a license which is merely a permit and one which is a form of taxation:(103)

"... tax is a general word which includes any contribution imposed by a competent authority to assure the services of the State. License would be a permission to do any act whatsoever. Although demanded with a view to regulation, it could nevertheless incidentally comprise an amount of money capable of assuring the services of the State. From this it may be realized that if a license seems to be imposed solely to assure revenue for the State, such permit is no longer a license but a tax, whatever may be the word used in the text of the Act."

In British Columbia, for example, the Terms and Conditions Respecting Licensing of Lottery Events impose licence fees of $50 and two per cent of gross revenues for bingos with prizes exceeding $500 and of $10 for those bingos offering prizes of less than $500. These relatively minor licence fees would seem to be in the category of a permit rather than a tax.

There is, however, another argument which might be made: that the proceeds of gambling events (which go to charitable or religious organizations) are a substitute for tax dollars. In other words, if the province did not allow these groups to raise revenues for themselves, the province itself would have to provide the social services and community amenities funded by those organizations through tax revenues. Provincially licensed gambling, from this perspective, is a form of surrogate taxation. The concept of

103 Ibid at 169, per Guerin J. Sess.
true lotteries as a form of indirect taxation is quite widely accepted and well-documented.(104) Regarding quasi-lotteries, however, this argument is more speculative and would require fairly minute analysis of provincial social services spending patterns before and after the expansion of gambling that has occurred particularly in the past decade. Just as the Indian bands who are interested in promoting gambling are using it as a substitute for powers of taxation, the provincial governments are also using gambling revenues as an alternative to direct taxation.

One final issue regarding the applicability of s.88 of the Indian Act which must be examined is the impact of band by-laws which purport to authorize and regulate gaming on reserves. Section 88 provides that provincial legislation which duplicates or conflicts with a by-law will not apply "in respect of Indians".

As was discussed above, s.81 of the Act provides band councils with rather limited powers to enact by-laws.(105)


105 See fn. 10 and surrounding text.
In a 1981 decision of the Quebec Court of Appeal they were categorized as follows: (106)

"The powers conferred by s.81 are first of all, powers to regulate, and to regulate only "administrative statutes". In other words, a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation. The power to give effect to regulations cannot extend beyond these administrative statutes; they are accessory and nothing more."

The band councils are, according to this determination, a third-rate, rather than a third order of government.

There have been attempts by more than 220 band councils to enact by-laws enabling bingo and other lottery schemes on Indian reserves pursuant to s.81(m)(107). All but one, passed in 1979, were disallowed by the Minister of Indian Affairs under the power contained in s.82. (108) The reason given for this action is that the Criminal Code takes precedence over the Indian Act. Starr reveals that, in an open letter to all Chiefs and Councils in British Columbia dated October 23, 1986, the Regional Director of Economic Development offered the following justification: (109)

"As you probably know, the Criminal Code takes precedence over the Indian Act. Thus the Department has

106 Re Stacey and Montour and the Queen, (1981) 63 C.C.C (2d) 61, per Bernier J.A.

107 "The council of a band may make by-laws ... for any or all of the following purposes, namely: ... (m) the control and prohibition of public games, sports, races, athletic contests and other amusements".

108 Starr, supra fn. 78 at 2-3.

109 Ibid at 4-5.
had no choice but to disallow the by-laws, notwithstanding our recognition of the economic benefits that can be generated by gaming activities."

In other words, the federal government considers itself bound by the agreement it made with the provinces in 1985 to vacate the field of regulating lottery schemes. And, despite the fact that the Criminal Code and the Indian Act are both federal statutes, the former is ranked above, and is deemed to prevail over the latter. The federal government is thus unprepared to recognize that Indian bands have the power under the by-law provision, or otherwise, to remedy the failure to address Indian interests in the 1985 federal-provincial agreement regarding jurisdiction over permitted gambling. As Lyon indicates, the practice of ignoring Indian enactments which purport to remedy such deficiencies, stems from the enactment of s.88 of the Indian Act which induces the belief that provincial laws fill all legislative gaps.(110)

Starr argues in the strongest terms that this represents an unnecessarily narrow approach to band by-law making powers and one which is at odds with the federal government's own view of the role that this power will play in realizing the future aspirations of Indian peoples regarding self-government.(111) She refers to two court

110 Lyon, "Constitutional Issues in Native Law", in Morse (ed.), supra fn. 9 at 421.
111 Starr, supra fn. 78 at 10-15.
decisions in which there is judicial acknowledgement of the intention of the Canadian government to expand the power over local band affairs in the pursuit of Indian self-government through economic self-reliance.(112) Her arguments are bolstered by recent amendments made to the Indian Act which expand the taxation powers of band councils.(113)

This situation underscores what to Indians is an incontrovertible political fact: that the provinces have far more power over federal policies, even those regarding Indians than do the aboriginal peoples themselves. As long as the Minister of Indian Affairs continues to exercise his veto power over band by-laws authorizing gambling activities on the reserves, there is limited opportunity to test their validity before the courts.

A case was recently brought before the Federal Court by a band for a declaration that two by-laws, unrelated to gaming, adopted by the band council were in force notwithstanding their disallowance by the Minister.(114) The federal trial judge dismissed the action on the grounds that


113 An Act to amend the Indian Act (designated lands), Bill c-115, S.C. 1986-87-88.

there was no requirement of fairness in the exercise of the power of disallowance and that the purpose of empowering the Minister to disallow by-laws is in part to allow him/her to take into account larger interests going beyond those of the band itself.\(^{(115)}\) Regarding gambling by-laws, these larger interests would be those of the provinces and of maintaining federal-provincial harmony. The judge did recognize, however, that it was at least arguable that the power of disallowance has some implied limitation in that "it may not be used to frustrate completely the purposes of the Indian Act\(^{(116)}\). It could be argued that the blanket disallowance of gambling by-laws is frustrating federal policy to secure the economic independence of Indians. If band councils cannot get their by-laws before the courts for a judicial assessment of their vires then perhaps a challenge to the power of the Minister under \textit{s.82} might be pursued.

The foregoing discussion illustrates that \textit{section 207} of the Criminal Code and \textit{section 88} of the Indian Act have combined to constitute a significant area of provincial control over activities on reserves. The arguments put forward, however, indicate that the provincial seal around the authorization and regulation of lottery schemes is not

\(^{115}\) \textit{Ibid} at 45.

\(^{116}\) \textit{Ibid} at 44 per Strayer J.
watertight. But these arguments can be criticized on the basis that they define Indian power to control gambling by reference to federal and provincial jurisdiction. They proceed on the basis that those powers, rather than those of Indians, are the crucial determinants. As was stated earlier, even if provincial jurisdiction were to be rejected and replaced by federal regulation of gambling, this would be unacceptable to those who favour Indian control. The final section of this chapter will be directed to an examination of these assertions of Indian jurisdiction.
Indian Jurisdiction

The authorization, operation and regulation of gaming on reserves is one aspect of a much larger issue requiring resolution by the Canadian polity: the allocation or division of power between federal, provincial governments and Canada's indigenous peoples.

During the past few decades, the claims of the latter to certain inalienable rights, particularly to land, but also to a significant measure of self-government, have been asserted in the strongest terms. They stem from the fundamental proposition that native peoples are sovereign nations rather than dependents of the state. While that sovereignty may have been ignored or denied in the past, it was not extinguished. As Flanagan observes, "[a] sovereign nation retains its right of self-determination even when it is under external domination."(117) Acceptance of this position involves a redefinition of established views. Thus, for example, Venne offers the following re-evaluation of the powers and functions of band councils:(118)

"Bands and band councils are often described as "creatures of statute", created as federal municipalities and exercising delegated powers. Indian Chiefs and Councils have rejected this analysis and are


118 Venne, "Indian Jurisdiction" in INAC, Gaming on Reserves, supra fn. 5 at 2.
asserting a contrary proposition: Indian governments have extensive powers of self-government, including taxation, which are not delegated from the federal government. The source of Indian government jurisdiction is not the Indian Act, but rather a pre-existing or "aboriginal" right of self government that has not been extinguished."

There is a growing body of literature which examines the historical roots and legal status of these claims.\(^{119}\) To some extent, their existence, at least on a symbolic level, is now beyond dispute with the enactment of s.35 of the Constitution Act, 1982, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".\(^{120}\)

The doctrine of aboriginal rights is, as Slattery indicates, a basic principle of Canadian common law that defines the constitutional links between the Crown and aboriginal peoples and regulates the interaction between the Canadian legal system and native rights, laws and institutions.\(^{121}\) The precise content of "aboriginal rights" as enshrined in the Constitution is, however, unclear.

\(^{119}\) e.g. Boldt and Long (eds.), supra fn. 3; Flanagan, supra fn. 117; Morse, supra fn. 9 and Slattery, "Understanding Aboriginal Rights", (1987) 66 Canadian Bar Review 725.

\(^{120}\) Because of the broad definition given to "aboriginal peoples" in s.35 - it includes the Indian, Inuit and Metis peoples - the potential impact of this provision extends beyond native Indians.

\(^{121}\) Slattery, supra fn. 119 at 732.
Mason describes s.35 as, at a minimum, setting a floor for native rights. (122) In Lyon's view, there is a range of possibilities encompassed by this provision which go beyond title to land and hunting and fishing rights to include the right to live under traditional forms of government and to be governed by customary laws. (123) There is increasing recognition being given to the position that s.35 recognizes the existence of a right to self-government, often described as a "third order of government" with powers parallel to those of the federal and provincial governments. (124) The concepts of aboriginal rights and of native self-government have evolved rapidly in recent years and have become inextricably connected. One observer has characterized the relationship in symbiotic terms: self-government is advocated as an aboriginal right, and a variety of aboriginal rights are advanced as aspects of native self-government. (125) Certainly, to have some constitutional status and protection, the right to self-government must be anchored to some source in the Constitution. (126)

122 Mason, supra fn. 3 at 438.
123 Lyon, supra fn. 110 at 419.
126 Nakaratsu, supra fn. 10 at 81.
The recognition of the right of self-government as an aboriginal right was advocated strongly by the Special Committee of the House of Commons which examined Indian self-government in the early 1980s. It recommended that s.91(24) of the Constitution Act, 1867 should be interpreted to allow Parliament to enact laws in all fields (including those reserved to the provinces in s.92) insofar as they relate to "Indians and Lands reserved for the Indians". Parliament should then proceed to vacate these areas of jurisdiction to recognized Indian governments. Consequently, virtually the entire range of law-making, policy, program delivery, law enforcement and adjudication powers would be available to a native government within its territory.(127)

In the Committee's view, native governments would derive their legitimacy not from Parliament, nor from the Constitution itself, but from the pre-existing rights of aboriginal peoples which the Constitution does not create, but merely recognizes.(128)

The precise nature of the aboriginal rights that are recognized by s.35 is the subject of considerable debate, mostly stemming from the inclusion of the phrase "existing aboriginal and treaty rights" within its terms. In addition, there has been no legislative action to implement the


128 Ibid at 328.
recommendations of the House of Commons Subcommittee, nor
have the constitutional conferences attended by federal,
provincial and native leaders with the aim of fleshing out
the precise scope of this provision met with any success.

There is a measure of consensus among academic writers
that an aboriginal or treaty right which has not been
extinguished, but simply restricted or limited by
legislation, is an existing right within s.35. A
representative statement of this view is provided by McNeil,
who propounds this test for determining "existing"
rights:(129)

"A workable test that might be applied to determine
whether a particular right has been extinguished or
merely rendered unexercisable would be to ask whether
the right would be restored if the legislation
affecting it was repealed. If the answer is no, then
the right must have been extinguished; if yes, it must
still exist and therefore is entitled to constitutional
protection under section 35(1)."

The criminal law is one area in which Indian peoples
are claiming their right to self-determination. Venne offers
this assessment:(130)

"The Criminal Code is a law of general application that
does not specify as applying to Indians. It no doubt
was assumed that Indians, being considered British
subjects, were to be covered by the Code. How does the

129 McNeil, "The Constitutional Rights of the Aboriginal
Peoples of Canada", (1982) 4 Supreme Court Law Reporter 255
at 258. See also Slattery, "The Constitutional Guarantee of
232.

130 Venne, supra fn. 118 at 25.
Criminal Code relate, if at all, to the continuance of Indian customary "criminal" law? There has been no specific statute terminating the Indian law, thus it continues to "exist". Indian criminal jurisdiction has been removed by federal and provincial policy, but these policies cannot be defined as an extinguishment."

If, to use McNeil's test, the Criminal Code were to be repealed vis-a-vis its applicability to native peoples on their lands, the right to self-determination on this issue could quite easily be revived. According to this scenario, inherent aboriginal rights would, according to the Task Force on Gaming on Reserves, take precedence over the Criminal Code and the Indian Act.(131)

To focus specifically on the lottery scheme provisions of the Code, it can be argued quite strongly that they have, in effect, already been repealed by federal evacuation of the area, leaving the way clear for a re-activation of Indian jurisdiction over the field. As was illustrated above, there is ample evidence that gambling is a traditional Indian activity, an essential part of native culture, although not in the form it assumes today.(132) As one native leader notes, it would be unrealistic to expect that an aboriginal right exercised in the late 1980s would still take its ancient form.(133)

131 Supra fn. 4 at 28.
132 See fn. 76 and surrounding text.
133 Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible Task of Identification and Definition", in Boldt and Long (eds.), supra fn. 3 at 27.
This is, in fact, the basis on which several Indian bands are claiming the power to conduct gambling operations on reserves. In British Columbia, for example, the Gitksan and Kitimaat tribal councils assert that gambling is an existing aboriginal right within the meaning of s.35 of the Constitution Act, 1982. In the face of provincial opposition to these assertions and counter-claims of exclusive provincial jurisdiction regarding lotteries and games of chance, the conflict will have to be resolved sooner or later.

As experience in the United States has shown, it is important, from the native perspective, that it be done in a manner which does not create or enhance provincial control over Indian affairs. One solution which might be pursued is the amendment of the Criminal Code and of the Indian Act to indicate clearly that neither federal nor provincial gaming enactments apply to lottery schemes conducted on reserves by band councils. It is unlikely that this would be done unilaterally by the federal government without extensive consultation with the provinces. It is equally unlikely that the provinces would concede to such changes without considerable concessions being made to them, by the federal government.

134 Starr, supra fn. 78 at 35. The Gitksan position is set out in more detail in an interview with tribal president, Don Ryans reported in Kahtou, vol. 6(11), 6/6/88.
A more satisfactory, long-term solution would be an amendment to the Constitution to provide, within a right of aboriginal self-government, jurisdiction over gaming on Indian lands. The immediate prospects for this kind of solution are not favourable in view of the failure of the constitutional conferences mandated by s.35.1 of the Constitution Act, 1981 to reach any agreement regarding the issue.

The other alternative is adjudication: asking the courts to determine jurisdiction over gaming on Indian lands in light of s.35 of the Constitution Act, 1981. There is not, as yet, a large body of case law on the impact of this constitutional provision. A recent decision of the Ontario Court of Appeal, however, sounds a cautionary note. In R. v. Agawa, (135) the Court was asked to decide whether the right to fish without a licence was an "existing treaty right" within the terms of s.35. In the appellant's case, the Court found that his treaty fishing rights had not been extinguished, but merely restricted by a licensing requirement. It went on to say that hunting and fishing rights could not be divorced from the realities of life in present-day Canada, which required the conservation and management of fish stocks. Accordingly, Indian treaty rights were held to be subject to reasonable limitations, such as licensing requirements, despite the fact the s.1 of the

135 [1988] 3 C.N.L.R.73 (Ont. C.A.)
Charter of Rights and Freedoms does not apply to s.35 of the Constitution Act. The exercise of Indian treaty rights, it was said, involved a balancing of the interests and values of the rights of others.

The Court of Appeal did not specify the entire range of interests that might be taken into account in determining the scope of "existing aboriginal and treaty rights". It could, potentially include provincial interests. If it does, then this test bears more than a passing similarity to that enunciated by the U.S. Supreme Court in California v. Cabazon Band of Mission Indians,(136) - that tribal jurisdiction can be limited by state legislation if state interests are adjudged to be sufficiently compelling. It remains to be seen whether the Supreme Court of Canada will endorse such an approach to aboriginal and treaty rights and allow provincial interests a critical role.

This chapter has established that native gaming is an issue which twenty years ago, would have been a matter between band councils and the federal government, which has exclusive jurisdiction over both Indian affairs and criminal law and procedure. As a result of a federal-provincial agreement of 1985, on which Indians were not consulted, the

136 Supra fn. 19.
rules regarding control over lottery schemes were changed and it was transformed into a dispute between band councils and provincial governments. There is, as a result, a struggle over the power to gamble on Indian lands. The outcome of this struggle could have an important impact on the much larger issue of the struggle for Indian sovereignty.
CHAPTER SIX

PROVINCIAL GAMING CONTROL: THE EXAMPLE OF BRITISH COLUMBIA

Provincial Gaming Control

The focus of the previous two chapters was on what might be termed the hidden implications of the legal transformation of lottery schemes in that they are not immediately obvious on the face of section 207 of the Criminal Code. These constitutional issues are of crucial significance nonetheless. In this final chapter attention is directed an equally important and more immediately discernible consequence of the decriminalization of lottery schemes: the growth of provincial gaming controls to regulate legalized lotteries and quasi-lotteries.

Gambling is still prohibited by the Criminal Code unless it has been licensed by the appropriate provincial authority, or is being conducted by the province itself. Implicit in this federal scheme of partial decriminalization are provincially-based regulatory structures to control public gaming. If a province is to take advantage of the federal exemption from criminal sanctions, it must inaugurate some system for regulating gambling activities.

For the purposes of the following analysis, it is helpful, at this juncture, to set out the express terms of

\[ \text{s.207:} \]

1 R.S.C. 1985, c.C-46
"s.207(1) Notwithstanding any of the provisions of this Part relating to gambling and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and such other province, in accordance with any law enacted by the legislature of that province;

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

(c) for the board of a fair or exhibition or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province ... has
(i) designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and
(ii) issued a licence for the conduct and management of a lottery scheme to that board or operator;

(d) for any person, pursuant to a licence issued by the Lieutenant Governor in Council... to conduct and manage a lottery scheme at a public place of amusement in that province....

(2) Subject to this Act a licence issued by or under the authority of the Lieutenant Governor in Council .... may contain such terms and conditions relating to the conduct, management and operation of of participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council ... or any law enacted by the legislature of that province may prescribe." (Emphasis added)

Under this legislative system, four parties are designated as qualified to "conduct and manage a lottery scheme": a provincial government; charitable or religious organizations; fair and exhibition boards and concessionaires; and any person at a public place of
amusement. Two regulatory configurations were prescribed: in accordance with any law, for a provincial government and under the authority of a provincially issued licence, which may contain terms and conditions relating to the management, conduct and operation of the lottery scheme, for the remaining three parties.(2)

Although not all provinces have embraced it to the same extent,(3) there has, overall, been a massive expansion of legalized gambling. Accordingly, this has necessitated the evolution of new regulatory structures within provincial governments. In western Canada, for example, there currently exist the Manitoba Lotteries Foundation, the Saskatchewan, Alberta and British Columbia Gaming Commissions and the British Columbia Lottery Corporation. In addition, there is the Western Canada Lotteries Foundation, which co-ordinates the operation of true lotteries in Alberta, Saskatchewan, Manitoba and the Yukon and North West Territories, and the Interprovincial Lottery Corporation, which is the co-ordinating body for all provincial true lottery schemes, the area in which the greatest expansion in legalized gambling has occurred.

2 When this provision was first enacted in 1969, the federal government was also designated as eligible to "conduct and manage a lottery scheme in accordance with regulations made by the Governor in Council ..." This was repealed in 1985: S.C. 1985, c.52.

3 For a comparison of the extent of gambling across Canada, see Beare et al., Legalized Gaming in Canada, 1988 (Ottawa: Ministry of the Solicitor General, 1988).
Government regulation of this type comes under the rubric of administrative law. One of the key Canadian treatises on the topic notes that administrative law evolved as a consequence of the rapid growth in the scope and diversity of administrative action in Canada and other countries in the twentieth century, and the corresponding need to subject it to legal control. (4) At every level, the state has become increasingly involved in regulating the lives and affairs of its citizens. Provincial regulation of a person’s access and ability to engage in legal gambling activities is another facet of this administrative expansion.

In this chapter, this new field of administrative action resulting from the amendment to the Criminal Code will be scrutinized, using the precepts of administrative law. The latter is, as Thomas points out, a comparatively new and open-ended arena of practice and study: (5)

"Defined broadly, it involves the official means that society adopts to control how administrative agencies make decisions that affect individuals, groups and organizations. More specifically, it refers to that portion of statute law which prescribes the structure and functions of departments and agencies, grants them authority to make rules and decisions, provides for the supervision and use of discretionary authority, and sets forth remedies in the event of illegal behaviour or procedural irregularities on the part of


administrative entities. It is almost trite to observe that ensuring the accuracy, integrity, fairness, effectiveness and accountability of administrative decision-making represents an enormous challenge when the scope and complexity of government has expanded so greatly."

Considerations of time and space preclude an examination of gaming controls in each province and territory. Instead, attention will be concentrated on the situation in British Columbia, which, in terms of the level of legalized gambling it permits and how it is controlled, is not atypical among the western provinces. Taking the quotation set out above as a reasonable definition of the functions of administrative law, the following discussion will utilize its indices of statutory authority, structure, function, discretion and remedies to examine how British Columbia has chosen to regulate gaming over the past two decades, and the legal implications of the choices that have been made.

Models of Decriminalization

Before proceeding with the stated task of analyzing the regulation of gaming in British Columbia, there is an a priori issue to be addressed, i.e. the structure of decriminalization which was adopted in 1969, i.e.- the substitution of provincial regulation or control in place of federal prohibition. This will provide a useful context
against which to assess subsequent developments in provincial policy.

As was discussed briefly in Chapter Two, when the federal government acted to decriminalize lottery schemes, it did not opt for the "do nothing" alternative to the use of the criminal law or what Skolnick and Dombrink have categorized as the "nullification model" of decriminalization of vice.(6) Rather, it chose to adopt what they term a "licensing" or regulatory model of decriminalization(7) because gambling is allowed under state permit or state operation. Consequently, legal controls on gambling have certainly not disappeared with the onset of decriminalization. As Skolnick and Dombrink observe,(8)

"the legislative prohibition may be lifted, but the government does not retreat. If anything, regulation may offer a purer case of "control" than prohibition."

Although the concept of decriminalization is apparently permissive, it is, when implemented, frequently of a highly interventionist and coercive character. One area where this has been particularly evident is in liquor control policy in both Canada and the United States. After the post-First World War experiments with alcohol prohibition met with resounding failure, they were replaced in both countries by

7 Ibid at 204.
8 Ibid at 196.
strict alcohol control, which, in the words of one observer, "aimed to substantially strengthen and enhance government power and involvement ... to construct and administer a system of regulation far more pervasive, intrusive and effective than anything before established". (9) Thus, government regulation replaced not only state prohibition, but also the unrestrained marketplace. When a regulatory model of decriminalization is used, state control expands rather than contracts.

The corollary of this, noted by Kane, is that, when government regulates social or economic activities, such as the consumption of alcohol, the purchase of lottery tickets or the playing of bingo, it necessarily restricts the freedom of individuals. (10) Part of the rationale is paternalistic. (11) Those who drink or gamble to excess risk injuring themselves and/or others in some way. While government regulation implies a tolerance of conduct that causes, or has the potential for harm, as Hawkins and Thomas


11 Breyer offers the following explanation of paternalism as a justification for government regulation: "Although in some cases the full and adequate information needed to reach a rational decision may be available to the decision-maker in the marketplace, some may argue that he will nevertheless make the wrong decision and therefore government regulation is needed." Breyer, "Analyzing Regulatory Failure etc.", (1979) 92 Harvard Law Review 549 at 558-59.
argue,(12) it is a limited tolerance and it also implies that the government knows best.

It may also facilitate other government objectives which may not be mutually compatible. For example, liquor control is a profitable source of government revenue.(13) State-operated lotteries also have revenue-generating potential. The paternalism inherent in controlled consumption of alcohol or lotteries must be reconciled with the government's need for revenue. Regulation, unlike criminal prohibition which is essentially one-dimensional, frequently must accommodate a number of competing goals.

Thus, the decriminalization of gambling effected in 1969 entailed a shift "from the relative conceptual simplicity of criminal prohibition to the subtlety and complexity of administrative regulation."(14) It was, perhaps, a development with which few provinces were immediately ready or equipped to handle.


13 Acheson, "Revenue vs. Protection: the pricing of wine by the L.C.B.O.", (1977) 10 Canadian Journal of Economics 246. Acheson also points out that liquor control also represents an opportunity to protect domestic producers of alcoholic drinks.

14 Skolnick and Dombrink, supra fn.6 at 194.
As was demonstrated in Chapter Two, the pressure to decriminalize lottery schemes came principally from Quebec, which, prior to 1969, was the only province actively pursuing the possibility of extensive legalized lotteries. The province immediately took advantage of the amendment to the Criminal Code and created two new Crown corporations: the Regie des loteries et courses du Quebec and the Societe d'exploitation des loteries et courses du Quebec. It was arguably the only province even minimally prepared for this new power. Nonetheless, the other provinces were not slow to utilize it and lottery schemes proliferated across Canada during the early 1970s, but administrative structures analogous to the Regie and the Societe did not generally appear until the following decade. While the absence of such bodies did not necessarily mean that the regulation of gaming was lacking in the other provinces, it was, as will be seen in the context of British Columbia, of a much more ad hoc, unstructured and informal nature.

15 Loi sur les loteries et courses, S.Q. 1969, c. 28. The Regie's main function was to supervise horse racing and the issuing of licences for charitable gaming. The Societe was set up to conduct provincial lotteries.

16 The Manitoba Lotteries and Gaming Control Commission was established in 1980 (The Lotteries and Gaming Control Act S.M. 1980, c.61); the Alberta Gaming Commission was established in 1981 (Alberta Order-in-Council 124/81) and the British Columbia Gaming Commission was established in 1987 (B.C. Order-in-Council 612/87).
A Regulatory History of Gaming Control in British Columbia

In this section a brief factual account of gaming control in the province will be offered in order to demonstrate its chronological evolution and major trends, and to indicate the legal issues which will subsequently be analyzed.

1970-74: The Quiet Period

The B.C. government waited almost a year before exercising its authority under what was then s.179A of the Criminal Code to legalize public gaming in the province. In April, 1970, regulations were enacted "pursuant to section 179A of the Criminal Code".\(^\text{17}\) At this point, the province was only interested in licensing charitable or religious groups who wanted to conduct lottery schemes, and gambling at agricultural fairs or exhibitions. Accordingly, the Attorney General was designated as the licensing authority and was vested with a discretionary power to issue licences. A small Licensing Branch was created within the ministry for this task. The regulations themselves set up a rudimentary licensing system, which was refined on matters of detail in 1971 and 1973.\(^\text{18}\)

1974: Provincial Lotteries and Legislation

\(^{17}\) B.C.Reg. 108/70.

\(^{18}\) B.C.Reg. 4/71; B.C.Reg. 17/73.
In May 1974, B.C. joined with its western neighbours, Alberta, Saskatchewan and Manitoba, to form the Western Canada Lottery Foundation to conduct and manage true lotteries in those provinces. The Foundation was set up as a corporate structure with two directors from each province responsible for corporate policy.(19) Each province was responsible for the marketing of provincial lotteries within its borders, and in B.C., this responsibility fell to the Lottery Branch created by the newly enacted Lottery Act.(20)

The creation of the Lottery Branch was not mandatory under the terms of the Act. "The minister", who was unspecified, was given the discretion to "establish within his ministry a branch of the public service for administering this Act and the regulations".(21) The Branch was duly created to carry out dual functions. Its primary responsibility was the conduct and management of provincial lotteries: essentially distribution and inventory control.

19 It is currently known as the Western Canada Lottery Corporation, and the Yukon and Northwest Territories have associate membership. The Ontario Lottery Corporation, Loto-Quebec and the Atlantic Lottery Corporation perform similar functions in their respective regions. The Interprovincial Lottery Corporation controls nation-wide true lotteries.

20 S.B.C. 1974, c.51; R.S.B.C. 1979, c.249.

21 Ibid, s.4. Regarding regulations, the Act specifies that the Lieutenant Governor in Council may make regulations "respecting the conduct and operation of lotteries by the Province" and "prescribing terms, conditions and fees respecting licences required under the regulations" (s.9).
Of less importance was its responsibility for the regulation and licensing of other lottery schemes within the province.

The **Lottery Act** also provided for the creation of administrative body, the Lotteries Advisory Committee charged with advising and assisting the minister respecting the administration of the Act, regulations, "or any matter respecting the conduct of lotteries" (s.3). This Committee has yet to be created.

Finally, the **Act** created a Lottery Fund, a separate financial entity within the Provincial Treasury, into which all proceeds from the conduct and operations of lotteries were to be paid (s.6). Initially, disbursements from the Fund were restricted to "cultural or recreational purposes or for preserving the cultural heritage of the Province", but s.7(b) of the **Lottery Act** was subsequently amended to allow money to be paid out "for any other purpose consistent with the objects of the Western Canada Lottery Foundation". (22) (Subsequently, British Columbia withdrew from the Foundation in 1985, and the provision now permits disbursements "for any other purpose the minister considers to be in the public interest"). (23)

22 S.B.C. 1977, c.76, s.21.

23 S.B.C. 1985, c.50, s.12, effective 7/7/87 (B.C.Reg. 194/87). Thus, for example, it was announced in the fall of 1988 that the province would use $162 million in lottery funds to create a regional and municipal renewal scheme: "Regions Hit Jackpot" **Provincial Report** (Fall, 1988).
The final development of 1974 was the transfer of the responsibility for provincial lotteries and licensing from the Attorney General to the Minister of the Provincial Secretary and Government Services. (24) The reason for this reallocation of ministerial responsibility is unclear, although it may have been designed to remove true lotteries from the perceived connotations associated with the Ministry of the Attorney General and its law enforcement functions. Certainly, true lotteries have remained under the aegis of the more neutral and bureaucratic Provincial Secretariat, whereas the regulation of other lottery schemes was transferred back to the Attorney General in 1986.

1975-85: Growth in Gaming

During this period there were relatively few changes in the regulatory structure of gaming control, while at the same time there was an exponential growth in gambling activities within the province. For example, in 1978, the province extended the range of permitted gambling by allowing charity-run casinos, offering blackjack and roulette to be set up. (25) The expansion of these casinos and of commercial bingo halls providing services to charitable groups gained momentum during the first half of the 1980s.

24 B.C.Reg. 436/74.
25 B.C.Reg. 265/78.
Ironically, the gaming control machinery was downsized during this period. This was due in part to the divorcing of the management of true lotteries from the Lottery Branch in 1982. It became the sole responsibility of the Western Canada Lottery Foundation, with its provincial headquarters in Richmond. The reduced Lottery Branch, which was also adversely affected by the government's policy of restraint, implemented in 1983, was left with the responsibility for licensing gaming for charitable purposes and at agricultural fairs.

1985-86: The Fork in the Road

As was previously mentioned, in April 1985, British Columbia withdrew from the Western Canada Lottery Foundation, and the B.C. Lottery Corporation was formed under the Lottery Corporation Act. (26) Its mandate is "to develop, undertake, organize, conduct and manage lottery schemes on behalf of the government", to co-ordinate lottery activities with the other provinces, to provide lottery supplies and "to do such other things as the minister may require from time to time" (s.4). By the year's end, the B.C. Lottery Corporation and its counterparts in other provinces were to have the exclusive power to conduct lotteries in Canada by virtue of an amendment to the

26 S.B.C. 1985, c.50.
Criminal Code. (27) Stability was achieved in relation to true lotteries.

Regarding state-licenced gaming, however, this was to be a more turbulent period. There was growing public concern, expressed through the media, (28) about the rapid expansion of gambling activities in the province. The government's response was to repeal the existing regulations enacted pursuant to the Lottery Act and what was then s.190 of the Criminal Code (29) and to replace them with "Policy Directives Respecting Licensing of Lottery Events in British Columbia". (30) These instruments were issued by the Minister of the Provincial Secretary who reserved the right "to modify or replace the Policy Directives at any time, and they supersede all other policy guidelines and regulations". To all intents and purposes, however, the Policy Directives were a slightly modified, more extensive version of the former regulations.

The Public Gaming Control Branch (formerly the Lottery Branch) was charged with administering provincial licensing

28 e.g. Bolan, "Small Groups Lose Out to Lure of Big Bingo", Vancouver Sun 3/8/85; McIntyre "Cops Probe Casino Operations", The Province 15/12/85 and Sagi, "Casino Gambling a Big Ante Business", Vancouver Sun 30/12/85.
29 B.C.Reg. 123/86.
30 Order in Council 1093/86.
of gaming for charitable purposes and at agricultural fairs. Late in the year, ministerial responsibility for such licensing was transferred back to the Ministry of the Attorney General.

1987-89: Consideration and Consolidation

In April 1987, the Attorney General appointed a Gaming Commission to develop policy for gaming within the province. (31) Its first task in this regard was to provide a comprehensive report on gaming activities in the region. In addition to this policy-making function, the Gaming Commission also assumed the power to issue licences under what was then s.190 of the Criminal Code and to prescribe "terms and conditions" for those licences. (32) The Attorney General issued "terms and conditions" which replaced the "policy directives" in the interim.

Alberta offers an interesting comparison at this juncture. There, in 1979, the government struck a Citizens' Advisory Committee on Gaming to report to a caucus task force. A key recommendation in the Committee's final report was the establishment of a separate regulatory agency. The Alberta Gaming Commission was established by Order in

31 Order in Council 612/87.
32 Order in Council 579/87.
Council in 1981.(33) In B.C. this policy development process was compressed and reversed with the appointment of the Commission at the outset and the consolidation of policy advice and licensing functions. With the creation of the Commission, a body of the type described by Rankin as a "quasi-independent regulatory agency",(34) the government moved the licensing function out of the regular departmental bureaucracy.

The Committee’s report was issued in January, 1988,(35) and although not all of its recommendations have been implemented, it was generally well received on all sides. It remains the provincial licensing body and has since issued revised terms and conditions for licensing. The Public Gaming Branch performs support and enforcement functions.

Finally, in June 1988, the Commission and the Gaming Branch were transferred to the newly created Ministry of the Solicitor General following government reorganization.


At present, gaming control in British Columbia has two distinct aspects: the regulation of true lotteries through a provincial Crown corporation and the licensing of other permitted lottery schemes by an administrative agency. The Lottery Corporation and the Gaming Commission are clearly key structures. They do not, however, rest on similar legal foundations. The Corporation has an explicit statutory base, a legislative mandate and an explicit fiscal and political accountability. The Commission, by comparison, has only vague and tenuous statutory connections. It is not a statutory creation. The structure and functions of the Commission are legally amorphous. For example, it fell heir to licensing tools called terms and conditions, which were formerly policy directives, which were formerly regulations. Their legal status is, at best, ambiguous. It is to an examination of statutory authority, the licensing function, legal remedies and the respective roles of the Lottery Corporation and the Gaming Commission that this chapter now turns.

**Statutory Authority to Regulate Gaming**

British Columbia’s authority to regulate gaming activities in the province is not an original or inherent power. It stems directly from the federal government’s exclusive jurisdiction over criminal law and procedure found
in s.91(27) of the Constitution Act, 1867. The discussion in Chapter Four makes clear that, were it not for the exemptions laid out in the Criminal Code, provincial legislatures would have no jurisdiction to permit the operation of lottery schemes therein prohibited. Parliament has effectively delegated its power over lottery schemes either to the provincial legislature,(36) (should the province wish to conduct and manage them itself), or to the Lieutenant Governor in Council.(37) In s.207 of the Criminal Code, Parliament has outlined general exemptions to the prohibition of lottery schemes, leaving their authorization, licensing and control to the provinces.

The arguments regarding the constitutional validity of this arrangement have already been extensively examined, and those observations will not be repeated here. Nonetheless, it should be noted that those arguments have considerable significance in the present context. Even if the constitutional validity of this arrangement were to be confirmed, there still remain a number of concerns regarding the statutory authority in British Columbia to ground the regulatory structure authorizing and controlling lottery schemes.

36 Criminal Code, s.207(1)(a).
37 Ibid, s. 207(1)(b)-(f).
Canada adheres to the principle of parliamentary democracy or responsible government. It is axiomatic to such a system that regulatory activities must be founded on the authority of the legislature. As one commentator notes, it is important to be aware that such interventions cannot be based upon some inherent power of the central authority, but must be based upon an explicit legal provision. (38) It is essential, under a parliamentary system of responsible government, to assure the accountability of regulators to ministers and to the legislature, whether the regulators function in a crown corporation, a board or commission, or within a government department. (39) The touchstone is what is called the parent legislation which provides the framework for the delegated authority. There must be statutory mandate. Rankin notes that when regulatory structures are set up, statutory goals should be spelled out in legislation, otherwise the legislature in effect is issuing "a blank cheque to make policies". (40) The parent Act is the "legal linchpin" which should provide a "coherent

38 Kane, supra fn. 10 at p.8.


40 Rankin, supra fn. 34 at p. 35.
framework"(41) in which to accommodate what Willis refers to as "conflicting desires":(42)

"The administrator wants enough room in his statutory powers to be able to do what is sensible in carrying out policy; on the other hand he also wants, for his own protection, some guidance from that organ of respectability, his legislature, on what he is supposed to do with them. The citizen wants the administrator to be able to do what is sensible when that would be to his, the citizen’s advantage but he more often wants to be able to plan his life without having to second guess what some [administrator] will do."

The provincial power to regulate public gaming comes from s.207 of the Code, but that provision does not resemble the kind of parent legislation normally encountered in a delegation of legislative power. It expressly and impliedly envisages the existence of provincial law - what might be called "step-parent" legislation - to provide the immediate statutory authority for the regulatory activities such as a government monopoly or licensing. For the situation to be otherwise, it would result in provincial gaming control bodies being politically accountable to Parliament, through the Minister of Justice, if at all.

Initially, however, British Columbia, in enacting lottery regulations, relied solely on the very general statutory authority found in what was then s.179A of the


Criminal Code: the power of the Lieutenant Governor or a designate to issue licences which may contain terms and conditions to permit gambling for certain purposes. These regulations imposed licensing fees. The significance of this is noted by Jones and de Villars commenting on the criteria employed by the Parliamentary Standing Committee which scrutinizes federal subordinate legislation. That Committee objects if a regulation contains provisions requiring payment to be made to the Crown or to any other authority in consideration of any licence or service to be rendered, "or prescribes the amount of any such charge or payment without express authority to that effect having been provided in the enabling statute". (43) The B.C. regulations were lacking in this regard.

In 1974, the province acted to put the regulation of public gaming on a more secure statutory footing, with the enactment of the Lottery Act. It provided a legislative base for the Lottery Branch, the Lottery Fund and the Advisory Committee and delegated to the Lieutenant Governor the power to make lottery regulations. The policy objectives of these creations were left undefined. In this regard, Rankin states, (44)

"To the extent that the legislative goals have been only skeletally defined in statutes, it becomes

44 Rankin, supra fn.34 at p. 36.
difficult to criticize the decisions of regulatory agencies for not meeting goals delegated by the legislature. The inevitable consequence of the failure to provide definite statements of statutory policy is that "broad discretion makes a politician out of the regulator."

The Lottery Act's inadequacies notwithstanding, it did at least anchor the regulation of public gaming in provincial legislation. For over a decade, it was to be the statutory basis of gaming control in B.C.

Then, in 1985, the regulation of true lotteries was placed on a different and more secure footing. The B.C. Lottery Corporation was created under the Lottery Corporation Act with a detailed legal structure and an explicit statutory mandate:

"s.4 The objects of the corporation are
(a) to develop, undertake, organize, conduct and manage lottery schemes on behalf of the government.
(b) where authorized by the minister, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of or in conjunction with the government of Canada or the government of another province, or an agent of either of them,
(c) where authorized by the minister, to enter into the business of supplying any person with computer software, tickets or any other technology, equipment or supplies related to the conduct of lotteries in or out of the Province, or any other business related to the conduct of lotteries, and
(d) to do such other things as the minister may require from time to time."

The Corporation is required to submit an annual report to the minister who must present it to the Legislature as soon as practicable (s.7(4)). Also, the directors of the
Corporation, in s.10 of the Act, are given the power to make regulations.

The use of Crown corporations as instruments of public policy is common at both levels of government in Canada and has been the instrument of choice for the conduct and management of true lotteries. There is an extensive literature on Crown corporations which will not be reviewed systematically here. Suffice it to say that, generally speaking, they are an alternative to either public regulation of private sector activity or direct departmental conduct of an activity. The former option was not permissible under the Criminal Code, which reduced the choice available.

Langford observes that a Crown corporation is more likely to be used in situations where it is felt that the managerial techniques and structures commonly identified with the corporate form will be more likely to result in the effective and efficient performance of a specific task than will the use of a traditional, hierarchical departmental bureaucracy with its rigidity, routine and political


influence.(47) They are established to give a measure of independence to the management of certain types of activities. In relation to true lotteries, the corporate form provides some appearance of distance from direct government without unduly attenuating government control. Thus, as Trebilcock and Prichard note,(48) by establishing public ownership through the corporate form,

"the government is able to make a symbolic statement that it is denying the forces of the market place and is determined to maintain control over the price, supply and channels of distribution of the product in order to encourage moderation in its consumption."

When the B.C. Lottery Corporation Act was passed, it did not formally repeal the Lottery Act. With the effective removal of true lotteries from its aegis, however, its scope was much reduced. Further, in June 1986, all regulations enacted pursuant to the Lottery Act and what was then s.190 of the Criminal Code were repealed and replaced by "Policy Directives" issued by the Minister of Provincial Secretary and Government Services pursuant simply to s.190. The initial arrangement set up in 1970 was restored, with licensing being conducted without reference to a provincial statutory base. This remains in effect, although the Policy Directives have been replaced by "Terms and Conditions"


48 Trebilcock and Prichard, supra fn.45 at p.73.
issued by the B.C. Gaming Commission. The Lottery Act has become virtually irrelevant.

This development might be partially explained by an amendment to s.207(2) of the Code enacted in January, 1986. Prior to that date, the subsection provided that a licence issued by ot under the Lieutenant Governor's authority might contain "such terms and conditions relating to the management and conduct of the lottery scheme to which the licence relates" as the Lieutenant Governor may prescribe. Subsection 207(2) now reads:

"Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province .... may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe." [New provisions underlined]

A strict interpretation of the wording of this subsection would appear to make provincial legislation optional. It is argued, however, that such a construction is tenable only if [1] the term "law" found in the subsection is used in the sense of primary legislation, and [2] that terms and conditions would otherwise be found in subordinate legislation enacted under a delegation of power found in parent legislation.

49 S.C.1985, c.52. This is the amendment which divested the federal government of any power to conduct and manage lottery schemes.
To find otherwise would, in effect, allow licensing by and on behalf of the province without any reference to provincial law. Nonetheless, it seems that British Columbia has chosen to view s.207(2) as making provincial legislation regarding the licensing of lottery schemes as optional.(50) Statutory authority is distinctly lacking.

Licensing Without Law

Where public gaming is to be conducted and managed other than by the province itself, the Criminal Code makes provincial licensing mandatory.* It is hardly surprising that this is the form of regulation which was chosen. One observer notes that, after 'the criminal law method', licensing is the tool most frequently used by the state in enforcing social policy.(52) Williams argues that licensing permits a closer surveillance of conduct than is possible under the ordinary criminal law.(53) It certainly allows an

50 It should be noted that B.C. is not alone in this regard. Alberta's regulatory structure, upon which B.C.'s is largely modelled, is virtually identical. Ontario also subscribes to a similar arrangement.

* In the brief review of the literature on licensing which follows, certain words and phrases will be underlined in order to indicate the assumption of an explicit licensing law found therein.

52 Willis, supra fn.42 at 354-55.

administrative assessment, in advance, regarding the presence of legal requirements or the absence of legal objections. The thrust is essentially preventative.

In any event, a licence grants a permission to do what is otherwise illegal, and is one of the oldest devices of administrative control. According to Freund, it can be used for a variety of purposes, but licensing of the type found in the context of provincial gaming control represents

"the administrative lifting of a legislative prohibition. The primary legislative thought in licensing is not prohibition but regulation, to be made effective by the formal general denial of a right which is then made individually available by an administrative act of approval, certification, consent or permit."

It is also an example of what Friedman calls "hostile licensing" in that it is imposed on the licensed group who had no participation in the drafting and enactment of the licensing laws and have no say in the licensing process. He compares it to "friendly licensing" which is usually induced by a trade or professional association to enforce


57 Freund, supra fn.54.
professional norms and restrict access to the licensed occupations. (58)

Having received the authorization from Parliament to licence lottery schemes, a province, in deciding to act upon it must determine several basic issues. According to one administrative lawyer, (59) these are
- who is to be the licensing authority;
- what will the applicant have to show to get a licence;
- is it to be subject to conditions, and of what kind;
- is there to be an appeal against a refusal or against the conditions. If so, to whom and on what grounds?

In any system of responsible government, it goes almost without saying that the answers to these questions should be found in the law. It should, in Street's words "be a simple matter to find out what licensing powers exist." (60) The Law Reform Commission of Canada has stated that normally, a licensee is governed by "generally applicable legislated standards" and by "specific conditions included in the licence" and, providing the licensee complies with the legal


59 Foulkes, supra fn.56 at 94.

60 Street, Justice in the Welfare State (2nd ed.) (London: Stevens and Sons, 1975) p.82.
requirements s/he is free to pursue the relevant activity. (61)

The Criminal Code of Canada is, of course, a public enactment but it provides little guidance to potential and actual lottery scheme licensees. From that federal statute, they can find out that they must be either a charitable or religious organization which must use the proceeds for a charitable or religious object or purpose; a board of a fair or exhibition or an operator of a concession, or someone who wants to run a small-scale lottery scheme at a public place of amusement. Any further information must come from the provincial level of government.

Until 1986, lottery regulations in the province of British Columbia were gazetted pursuant to the Regulation Act, (62) and thus, in theory at least, were accessible to the general public, including licensees. Those regulations were repealed and replaced by policy directives, which in turn were replaced by terms and conditions, neither of which have been published in the B.C. Gazette. The legal status of these instruments deserves further consideration.

A ministerial policy directive is a phenomenon which, although fairly recent, is becoming increasingly common in Canada. In their administrative law treatise, Dussault and

61 Law Reform Commission of Canada, supra fn.55 at 41.
Borgeat describe the directive as a governmental norm regulating the activity of public servants. It is rarely based on an express statutory provision. More commonly, its source is in the general powers of the government. Unlike a regulation, the directive is implicit in its origin and is directed mainly to the internal organization of the administration and its public servants. (63) In short, it is

"a rule of conduct of an internal nature made by an administrative authority pursuant to a general power of control, in order to structure the action of one's subordinates, and for which failure to obey is subject to an administrative and non-judicial sanction." (64)

The ministerial policy directives issued in 1986 respecting the licensing of lottery events in B.C. would not appear to fit this definition. Firstly, they were not primarily of an internal nature, being directed to the licensee as much as the licensing authority. Secondly, the province does not possess a general power of control over lottery schemes. Finally, although failure to follow the directives may have resulted in disciplinary action for the administrator, it may also have resulted in criminal sanctions for the licensee. Operating a lottery scheme without a licence, or in violation of the terms and conditions of a licence takes the operator outside the scope of the exemptions provided in s.207 of the Code and is a criminal offence under s.207(3) subject to a maximum

63 Dussault and Borgeat, supra fn.4 at 17.
64 Ibid at 329.
punishment of two years' imprisonment.(65) Conversely, while policy directives are internally binding, they are not justiciable. They do not confer legally enforceable rights on third parties even though such parties may be adversely affected by non-compliance.(66)

While it recognizes the definition of directives offered by Dussault and Borgeat, the Law Reform Commission of Canada, in its report on independent administrative agencies, concentrates on a much narrower conception of the phenomenon. According to the Commission, directives are instructions specifically authorized by statute to be issued by Cabinet or a minister and issued in a formal instrument to bind an agency to the policy the government intends to see followed on a given question and should have the form of regulations. They are of a legislative rather than an administrative nature.(67) This comes closer to describing the character of the lottery licensing policy directives, but they were not specifically authorized by statute, nor were they constituted as regulations. As Starr

65 This potential outcome renders the failure to publish the policy directives and terms and conditions in the Gazette even more questionable.

66 Law Reform Commission of Canada, supra fn.41 at p. 24, fn.28. An good example of this are the directives issued by the Commissioner of Penitentiaries which have been held by the Supreme Court of Canada not to be legally enforceable by prison inmates even though they were adversely affected by the failure of the authorities to follow the directives: Martineau v. The Queen, [1978] 1 S.C.R.118.

67 Ibid at pp. 23-4 and 26.
indicates, (68) the provisions of the lottery directives were clearly intended to be regulatory in nature, but were not validly enacted regulations.

In any event, the policy directives have been repealed and replaced by terms and conditions which are issued by the B.C. Gaming Commission, but which are not gazetted. A recent decision of the Ontario Supreme Court found that such terms and conditions are not regulations or statutory instruments and there is no requirement that they be gazetted. In R. v. Furtney et al., (69) the Court rejected the respondents' argument that they were charged with an offence unknown to law because the terms and conditions, although referred to in lottery licences, were not published. As was indicated above however, operating a lottery without or in violation of a licence constitutes a federal Criminal Code offence, which, of course, is an offence known to law.

The terms and conditions, and the policy directives which preceded them, would appear to come closest to what English commentators have termed "quasi-legislation". First adopted by Megarry in 1944, (70) it encompasses law-which-is-not-a-law, e.g. administrative arrangements and practice

68 Starr, "Submission to Task Force on Gaming on Reserves" in Indian and Northern Affairs Canada, Gaming on Reserves: etc. (Ottawa: I.N.A.C., 1987) p. 9.

69 Unreported decision, Supreme Court of Ontario, 13/9/88.

notes. It is criticized for its haphazard mode of promulgation (71) and for the lack of legal controls over it. (72)

Ganz recently subjected the concept of quasi-legislation to rigorous analysis and concluded that it has indirect legal effect. Thus, for example, a grant or renewal of a licence is made conditional upon compliance with quasi-legislation and conditions based on the quasi-legislation are attached to the licence. (73) This is essentially the legal situation in British Columbia regarding lottery licensing. It is achieved without recourse to a formal legal base. Nonetheless, it has an indirect legal effect which is bolstered by the Criminal Code offence of operating an unauthorized lottery scheme.

Remedies

As was stated above, (74) one of the functions of administrative law is to provide remedies for illegal behaviour or procedural irregularities on the part of the administrative authority. Those remedies are generally

71 Ibid at p. 128
73 Ibid at p. 16.
74 Supra fn. 4 and surrounding text.
sought through judicial review of the administrative action. (75) Having set out the origins, nature and scope of the regulation of public gaming through licensing, this section will examine the legal remedies which might be available in instances of administrative abuse in the licensing process.

Judicial review is based on the fundamental principle that powers can be validly exercised only within their true limits. Consequently, a court will only examine the legality of an administrative decision and not its merits. (76) Until recently, the procedural requirements for judicial review were antiquated and complex. One commentator notes that the fact that the scope, grounds and procedure of judicial review varied according to the decision in issue, the character of the decisionmaker and the kind of defect alleged meant that, at common law, an otherwise valid claim for judicial review could be defeated by an error in the

75 Judicial review is distinct from any right of appeal from a decision of an administrative body. One observer notes that there is no inherent right of appeal in such circumstances; it is a statutory right - Klassen "Appeals from Administrative Tribunals" in C.L.E.S.B.C., Administrative Law (Vancouver: C.L.E.S.B.C., 1988) pp.3.2.01-09 at 3.2.01. Nonetheless, the B.C. Gaming Commission provides a non-statutory right of appeal to the Commission "in respect of an action, order or decision of the Gaming Commission or the Public Gaming Branch, their members, officers or employees". These "Gaming Commission Appeal Procedural Rules" are set out in C.L.E.S.B.C., Administrative Law p.1.3.23.

choice of remedy. (77) With the enactment of the Judicial Review Procedure Act of B.C. (78) these procedural difficulties have been largely eliminated.

Judicial Review of Delegated Powers

The lottery licensing scheme in British Columbia, as indicated, has a key deficiency in terms of its statutory underpinning and delegated power. During the 1980s, the courts in B.C. have been receptive to the use of subdelegation arguments to attack administrative action. The essence of such arguments is, as Bryden indicates, (79) that discretionary decision-making authority has been redelegated to subordinate officials without appropriate guidelines having been provided for the exercise of that discretion or that the power to subdelegate has not been granted expressly or impliedly by the relevant legislation. Accordingly, in Re Mia and the Medical Services Commission of B.C. (80) the issuance and denial of billing numbers to doctors was found not to be authorized by the Medical Services Act, constituting an excess of jurisdiction. Similarly, in Western Canada Wilderness Committee et al., v. Minister of

77 Kaplan, "Judicial Review Under the Judicial review Procedure Act" in C.L.E.S.B.C., supra fn.106, pp.3.1.01-15 at 3.1.05.


79 Bryden, "Non-Traditional Decision-making" in C.L.E.S.B.C., supra fn. 75 pp.1.2.01-09 at 1.2.03.

the Environment,(81) members of a public interest group sought a declaration that the decision-making power of a ministry official was ultra vires and a permit to hunt wolves from aircraft was accordingly null and void. The relevant statute gave the official the authority to issue permits in accordance with regulations made by the Lieutenant Governor in Council, but those regulations simply transferred the authority to issue permits without legislative guidance. The B.C. Supreme Court found that this did not constitute "a complete scheme of standards and criteria by which the officer is to be guided" and was therefore an unlawful subdelegation of a discretionary power.

Regarding lottery licensing, there is no constituent legislation establishing the B.C. Gaming Commission and defining its powers. It has been designated by the Lieutenant Governor in Council in an Order in Council as the provincial body responsible for issuing both terms and conditions and the actual licences. There is, however, no "complete scheme of standards and criteria" by which it is to be guided.

A related argument also based on the subdelegation principle may also be fruitful. In his article examining recent developments in the area of subdelegation, Keyes

observes that there are numerous cases in which the issue is not one of the transfer of power from a delegate to a subdelegate. Rather, the issue is the delegation of a legislative power so that it is exercised administratively or that an authority has attempted to use an administrative power to achieve something which should have been done through delegated legislation. (82) Thus, for example, it might be argued that designation of the B.C. Gaming Commission as the rule-making body for lottery licensing without legislated guidelines, results in the licensing scheme being established administratively.

In such instances the courts have imposed what is, in effect, a duty to make law in order to enable those who are subject to such a regulatory scheme to know the law and to structure their affairs accordingly. For example, the Canadian Transport Commission was prohibited from imposing conditions in air carrier licences through a general order, (83) and a provincial rent commission was found to have improperly fettered its discretion by considering internal policy guidelines which should have been, and subsequently were, promulgated as regulations. (84)


Keyes cautions that this duty to make law must be considered in light of the Supreme Court's decision in *Capital Cities Inc. v. C.R.T.C.* (85) in which it was held that the parent legislation did not compel the C.R.T.C. to use its regulation-making powers. (86) Instead, the Commission could regulate cable television on an *ad hoc* basis, laying down informal "guidelines" for the exercise of its licensing discretion. Keyes offers the following assessment: (87)

"The decision in *Capital Cities* flows from a broad reading of the C.R.T.C.'s twin administrative and legislative powers. Laskin C.J.C. refused to divide these powers, but rather recognized the administrative exigencies that warranted the flexibility of issuing informal guidelines or "quasi-law" to provide direction for the exercise of the C.R.T.C.'s administrative powers without binding its discretion as regulations would have done. The decision suggests that when the regulation of a particular area is in its initial stages, the considerations underlying the duty to make law can be satisfied other than by making delegated legislation..."

The B.C. Gaming Commission also possesses legislative and administrative powers: the power to prescribe terms and conditions for lottery licensing and the power to grant licences. The regulation of public gaming in the province is similarly in its initial stages. Conceivably, therefore, *Capital Cities* could apply to preserve the present structure until gaming control had reached a level of maturity. It


86 Keyes, *supra* fn.82 at p. 83.

87 *Ibid* at 84.
should be noted, however, that the C.R.T.C., unlike the B.C. Gaming Commission, is a statutory creation. The combination of the absence of law in licensing and in the constitution and operating procedures of the licensing body could be viewed as permitting too great a flexibility in the provincial regulation of lottery schemes. Consequently, a duty to make law in either or both of these areas could be imposed by the courts.

Judicial Review of the Exercise of Discretion

In order to carry out their mandate, most regulatory authorities possess discretionary decision-making powers. There are no strict guidelines to confine their decisions on certain issues. Administrative law requires that discretionary powers must be exercised properly i.e. in good faith, without an improper fettering of the discretion, without taking into account improper considerations and conversely, without ignoring relevant considerations.

The most significant discretionary power of the B.C. Gaming Commission is the determination of eligibility for a licence, which involves an evaluation of the applicant. For example, the Commission will assess whether an applicant-organization constitutes a charitable or religious organization. Such groups are eligible for a licence if the proceeds from the lottery scheme are used for a charitable
or religious object or purpose(88). The Criminal Code does not further define these terms and relevant court decisions are scant and largely unhelpful(89). In the most recent version of the Terms and Conditions, "charitable object or purpose" is defined in relatively vague terms as the relief of poverty; the advancement of education and/or religion; and other purposes beneficial to the community. The Commission has itself recently expressed a desire to have clearer guidelines for determining eligible groups.(90) In the meantime, a group which is denied a licence could ask the courts to determine whether that discretion was properly exercised.

There are very few reported cases dealing with provincial licensing of lottery schemes. One of these, Bingo Enterprises Ltd. et al. v. Manitoba Lotteries and Gaming Licensing Board,(91) addresses the curtailing of a discretionary power. The applicant owned two premises at which it conducted games of bingo for charitable

88 Criminal Code, s.207(1)(b).

89 e.g. In LaRose v. Fleuty, (1971), 5 C.C.C.(2d) 528 (Alta.S.C.) it was held to be insufficient for the money to be raised for a charitable purpose; the sponsoring organization must also be a charitable organization. The court found that a certain organization running a charity raffle was not such an organization, but failed to state the criteria which were used to make this determination.


91 (1983) 2 Administrative L.R. 286 (Man.C.A.)
organizations who were in possession of a licence from the Manitoba Licensing Board. The Board adopted a policy of not licensing organizations who wanted to use the second of these premises. Bingo Enterprises initiated legal proceedings as a result, seeking inter alia a declaration that the conduct of the Board was unlawful. The Manitoba Court of Appeal found that although Bingo Enterprises was not an applicant for a licence it had a sufficient interest in the issue to be entitled to a remedy. Further, while the Board had a discretion as to whether it would issue such licences, it could not single out the applicant for special treatment, unrelated to any general policy:(92)

"It might not be unlawful for the lotteries board to adopt a policy to issue fewer licences or to restrict licences to a particular size of accommodation, or to issue licences in a manner which prevents the establishment of a gaming house, or to issue licences in a manner which will assure that bingos will be held in areas which will service certain geographic portions of the city or province. Within such general policy guidelines the plaintiff would have to function in common with all others seeking to host such events. What the lotteries board cannot do is single out Bingo Enterprises for special treatment that is not related to any such general policy."

This decision confirms that, in exercising a discretionary decision-making power, it is acceptable to adopt a general policy regarding the factors to be taken into account, although de Smith notes that this cannot be done to the extent that consistency is pursued at the

92 Ibid at p. 296 per O'Sullivan J.A.
expense of the merits of individual cases.\(^{(93)}\) It is unacceptable, however, to have a policy which states that applications of a certain type will not be entertained. One commentator observes that there is a dividing line between "the legitimate pursuit of a general policy in a matter of administration" and "the enforcement of an extra-statutory regulation".\(^{(94)}\) To return to a recurring theme of this chapter, such a hidden rule means that interested parties are denied adequate knowledge of how an administrative authority will exercise it decision-making power in a particular situation.

**Judicial Review of an Error of Law *ex facie***

Although the courts will not review the substantive and procedural merits of a case, they will step in to correct an error of law on the face of the record of an administrative decision. In the recent case of *Charity Vending Ltd. v. Alberta Gaming Commission et al.*\(^{(95)}\) a manufacturer of a pull-ticket vending machine sought a declaration regarding the decision of the Gaming Commission that this machine was a slot machine. The Criminal Code does not permit charitable groups to operate slot machines. Consequently, the Gaming


Commission was refusing to issue licences to those groups who sought to use the applicant's machines. In the Court of Queen's Bench, the application was granted. It was held that the machine in question did not constitute a slot machine as defined in the Criminal Code and that the Commission's decision to prohibit the use of them was ultra vires and void. The Commission misdirected itself in law by taking into account a point of law which was wrong. This decision, however, has since been reversed on appeal with the initial determination of the machine as a slot machine being restored. (96)

Judicial Review of Procedure

Prior to the Supreme Court of Canada's decision in Nicholson v. Haldimand-Norfolk Board of Police Commissioners (97) there were close limits on the extent to which the courts would impose procedural obligations on regulatory bodies. The rules of natural justice (encompassing the right to a hearing and to an impartial adjudicator) were imposed only upon judicial or quasi-judicial bodies. The administrative/judicial distinction was

96 Charity Vending v. Alberta Gaming Commission, unreported decision of the Alberta Court of Appeal, 21/11/88. The Court also brought into question the use of judicial review procedure for reviewing a policy which was not "a decision directly affecting the applicant for relief", i.e. the manufacturer was not an applicant for a licence, but a mere supplier to licencees. This issue was not decided as the Gaming Commission chose not to raise it.

therefore crucial in this regard. Reid and David note that licensing functions could be classified either way. There were no hard and fast rules. It depended on the characteristics of the particular licensing scheme.\(^{(98)}\) With the introduction of a duty to observe procedural fairness incumbent upon administrative decision-makers in Nicholson, the Supreme Court rendered the administrative/judicial distinction virtually irrelevant from the viewpoint of the availability of judicial review.

As to how this might affect provincial gaming control procedures, the decisions in *Energy Probe v. Atomic Energy Control Board*\(^{(99)}\) and *Scarborough Community Legal Services v. The Queen*\(^{(100)}\) should be considered.

*Energy Probe* concerned a challenge to a decision of the A.E.C.B. to renew a licence on the basis of an allegation of pecuniary bias on the part of a Board member. Reed J. noted that the parties were unanimous that the licensing function of the A.E.C.B. was an administrative one and not judicial or quasi-judicial. Accordingly, the doctrine of fairness enunciated in Nicholson applied to the A.E.C.B.'s licensing decisions. He concluded that the duty to act fairly must


\(^{100}\) [1985] 2 F.C. 555 (F.C.A.).
include a requirement for an unbiased decisionmaker. Any other conclusion would undercut the whole concept of the requirement of a duty of fairness. (101)

Mullan adds a caveat to this decision which might limit its applicability in the gaming control sphere. He argues that the Federal Court judge was dealing with licensing functions which in reality were more judicial or quasi-judicial than they were administrative and suggests that, for licensing schemes which are truly administrative, "predispositions, firmly-held policy preferences, and the like may and perhaps should be more readily tolerated." (102) There is thus some ambiguity as to whether the Gaming Commissioners must be free of all bias.

Scarborough Community Legal Services on the other hand, suggests fairly clearly that the right to procedural fairness in obtaining a licence to conduct a lottery scheme does not encompass the right to make representations beyond the initial application, or the right to a hearing. In that case S.C.L.S., which was denied status as a registered charity by the Minister of National Revenue argued that it had been denied natural justice or procedural fairness due to a failure to receive prior notice of the case against it.

101 Energy Probe supra fn. 99 at p. 233-34, per Reed J.

and the opportunity to meet that case. The majority rejected this argument, holding that the function of the Minister in dealing with an application for registration as a charity is strictly administrative. The Court did suggest, however, that different considerations would apply to the revocation of such registration:(103)

"While a decision to revoke a previously recognized special status on the ground of unacceptable conduct has the effect of penal conviction and the function of making it may probably be said to be quasi-judicial, it being similar to that of a judge presiding over a penal tribunal, a decision to deny an applicant the right to be given special status on the facts and evidence submitted by him, lacks the basic characteristics of an adjudication inter partes by a court of law."

Regarding the licensing of lottery schemes, however, termination is inherent. Licences are issued for a specified number of lottery schemes in a given period, with no guarantee of renewal. Thus, while licences can be revoked for cause, the renewal of licences is arguably the more significant power and is treated procedurally the same as new application.

Judicial review of administrative action cannot remedy every legal deficiency in a lottery licensing scheme, but does present a possible avenue of redress not only for those seeking a licence, but perhaps also for those involved in

103 Scarborough Community Legal Services, supra fn.100 at pp.575-76 per Marceau J.
the business of providing facilities and supplies(104) and for other interest groups.(105) It does, however, represent a short-term, individualized solution to a problem which demands radical legislative action.

Twenty years ago Parliament created a new area requiring provincial regulation: legalized gambling. The development of provincial gaming controls, within British Columbia at least, has not been smooth. In part, this is attributable to the singularity of the status of legalized gambling. It sits ambivalently between the jurisdiction of the federal and provincial levels of government.

Not all the growing pains are unique to gaming control, however. For example, Janisch has noted that, in general, regulatory policy is not inspirational but incremental:(106)

"In other words, one does not have inspirational thoughts on regulatory policy; one has experience, makes mistakes, tries to make adjustments, has experiments...."

Experience in British Columbia has resulted in a bifurcated system of control focussing on the B.C. Lottery Corporation and the B.C. Gaming Commission. The former has been

104 e.g. Bingo Supplies Ltd. supra fn.91 c.f. Charity Vending supra fn.96.

105 e.g. Energy Probe, supra fn.99, and Western Canada Wilderness Committee, supra fn.81.

106 Evidence submitted to the Parliamentary Committee on Regulatory Reform, quoted in Rankin, supra fn.34 at p. 41-2.
formalized in legislation; the latter operates in a legal no
man's land.

Initially, perhaps, regulatory structures and
procedures were required to be particularly flexible to
allow experimentation and adjustment. Nonetheless, such a
situation cannot be allowed continue indefinitely without
damaging the infrastructure of parliamentary democracy and
responsible government. The B.C. Gaming Commission has
itself recognized the need for a legal foundation for all
the activities of the Commission and the Public Gaming
Branch in a new provincial statute and regulations.(107)
This was not one of the Commission's recommendations which
was immediately acted upon by the government, but the
enactment of such legislation would provide the statutory
base which is currently lacking in the licensing of lottery
schemes. Licensing in the absence of law ought to become an
historical footnote.

107 B.C. Gaming Commission, supra fn.35 at p.I-3.
CONCLUSIONS

The stated aim of this thesis was to provide some understanding of how the legal status of lottery schemes in Canada has been transformed in the last twenty years, why it occurred and what its consequences have been. It was a task entailing legal research in a number of diverse areas, which in itself is an indicator of the complexity of the agenda. As a consequence of this, there is no single, unifying conclusion, but rather a number of related closing remarks.

The opening chapters demonstrated the historical and political dimensions of the transformation process. Historically, European-style lotteries were used in this country for raising revenues for public works projects before the introduction of taxation schemes, and also for raising money for "good causes". The former were abolished in the early 19th century, but the latter, except for a brief hiatus, have been allowed, but on a very small scale. These restrictions were lifted in 1969 and, at the same time, state lotteries were reintroduced as a form of indirect taxation. This radical change in the rules was done relatively quickly, with a minimum of fuss and very little in the way of public discussion. It was a silent transformation.

There were, it was shown, well-established, philosophically sound reasons for the removal of criminal
sanctions from certain gambling games, but there were also political, social and economic reasons which were equally, if not more important in explaining its occurrence. And, regardless of the validity of the reasons for the decriminalization of lottery schemes, it had to be accomplished not within the realms of some ideal legal system, but within the parameters of Canada's constitutional framework. In a federal system like the one existing in this country, where the criminal law power belongs to the central government, account should have been taken of constitutional imperatives. In this instance, however, the legislative drafters devised an innovative exemption from the operation of criminal sanctions for lottery schemes: a provision of the Criminal Code made them legal if they were operated or licensed by a provincial authority, or, until 1985, if they were conducted by the federal government. In view of the constitutional proscription of the interdelegation of powers between legislative bodies, this arrangement is dubious at best. Instead of taking lottery schemes out of the Code altogether and simply leaving it to the provinces to intervene as they saw fit, or of adopting a federal regulatory scheme administered by the provinces, this highly questionable alternative was chosen which effectively redistributed legislative authority without a constitutional amendment and ultimately resulted in federal control over lottery schemes being exchanged in 1985 for provincial cash.
The *sub silentio* nature of the process by which legalized lottery schemes were created in 1969 and totally removed from federal jurisdiction in 1985 has had serious consequences. The lack of debate is at least partly responsible for the incoherent response on the part of some provinces, which soon took advantage of their ability to conduct and manage lottery schemes, but did not appear to have an articulate gaming control policy. That, combined with the singular nature of the decriminalization arrangement, has in British Columbia at least, produced a regulatory scheme developed without reference to a solid statutory base, providing sound and well-developed legal parameters.

The executive federal-provincial agreement of 1985, which led to the federal government divesting itself of all power over legalized lottery schemes, perpetuated a tradition of failing to take into account an important segment of Canada's population: its aboriginal peoples. It was shown that gambling games have been played in this country since time immemorial by the native Indians, but that when it was settled by Europeans, gambling was criminalized without regard to these long-established Indian traditions. Just as native interests were disregarded when gambling was made a criminal offence, they were similarly ignored in the decriminalization process and in the redistribution of control over lottery schemes. The
difference this time, however, is that Indian bands are not willing to acquiesce. The gambling controversy is seen as being important in its own right, and as a vehicle for furthering Indian sovereignty. It is this issue more than any other which will, in all likelihood, force a re-examination of the legal status of lottery schemes.

In the final analysis, therefore, it is clear that, twenty years after the fact, with lottery schemes a popular pastime which support community projects and generate significant amounts for government coffers, the transformation of their legal status is beset with confusion. Changing the rules regarding lottery schemes set in motion changes in the constitutional sphere, in the expansion of administrative controls and in the fragile relationship between native Indians and the federal and provincial governments. The final results have still to be played out.
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